

1997

Boyd J. Brown and Interwest Aviation Corporation v. David K. Richards & Company and David K. Richards : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bruce E. Coke; John W. Call; Nygaard, Coke & Vincent; Attorneys for Plaintiffs, Appellees, and Cross-Appellants.

Robert S. Campbell, Jr.; Bridget K. Romano; Campbell Maack & Sessions; Elizabeth T. Dunning; Carolyn Cox; Watkiss Dunning & Watkiss; Attorneys for Defendants, Appellants, and Cross-Appellees.

Recommended Citation

Brief of Appellee, *Brown v. Richards*, No. 970536 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1059

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

BOYD J. BROWN, an individual,
and INTERWEST AVIATION
CORPORATION, a Utah corporation

Plaintiffs, Appellees, and
Cross-Appellants,

vs.

DAVID K. RICHARDS &
COMPANY and DAVID K.
RICHARDS, an individual,

Defendants, Appellants,
and Cross-Appellees.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
K F U
50

.A10
DOCKET NO. 970536

Case No. 970536-CA

Priority No. 15

BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal From a Judgment of the Third Judicial District Court, in
and for Salt Lake County, State of Utah, the Honorable
Kenneth Rigtrup, Judge, presiding by the Honorable Stephen L.
Henriod, Judge.

ROBERT S. CAMPBELL, JR. (0557)
BRIDGET K. ROMANO (6979)
CAMPBELL MAACK & SESSIONS
201 South Main Street, 13th Floor
Salt Lake City, Utah 84101

ELIZABETH T. DUNNING (3896)
CAROLYN COX (4816)
WATKISS DUNNING & WATKISS, P.C.
111 East Broadway, Suite 800
Salt Lake City, Utah 84111-2304

Attorneys for Defendants, Appellants
and Cross-Appellees

BRUCE E. COKE (0694)
JOHN W. CALL (0542)
CURTIS C. NESSET (4238)
NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, Utah 84103

Attorneys for Plaintiffs, Appellees,
and Cross-Appellants

Utah Court of Appeals

AUG 10 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

BOYD J. BROWN, an individual,
and **INTERWEST AVIATION**
CORPORATION, a Utah corporation

Plaintiffs, Appellees, and
Cross-Appellants,

vs.

DAVID K. RICHARDS &
COMPANY and **DAVID K.**
RICHARDS, an individual,

Defendants, Appellants,
and Cross-Appellees.

Case No. 970536-CA

Priority No. 15

BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal From a Judgment of the Third Judicial District Court, in
and for Salt Lake County, State of Utah, the Honorable
Kenneth Rigtrup, Judge, presiding by the Honorable Stephen L.
Henriod, Judge.

ROBERT S. CAMPBELL, JR. (0557)
BRIDGET K. ROMANO (6979)
CAMPBELL MAACK & SESSIONS
201 South Main Street, 13th Floor
Salt Lake City, Utah 84101

ELIZABETH T. DUNNING (3896)
CAROLYN COX (4816)
WATKISS DUNNING & WATKISS, P.C.
111 East Broadway, Suite 800
Salt Lake City, Utah 84111-2304

BRUCE E. COKE (0694)
JOHN W. CALL (0542)
CURTIS C. NESSET (4238)
NYGAARD, COKE & VINCENT
333 North 300 West
Salt Lake City, Utah 84103

Attorneys for Plaintiffs, Appellees,
and Cross-Appellants

Attorneys for Defendants, Appellants
and Cross-Appellees

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	3
STATEMENT OF THE CASE	3
FACTS	4
SUMMARY OF THE ARGUMENT	8
ARGUMENT	10
<u>POINT I</u>	10
RICHARDS IS NOT ENTITLED TO ANY ATTORNEY FEES BECAUSE EVIDENCE SUPPORTING HIS FEE APPLICATION ON REMAND DID NOT MEET THE REQUIREMENTS IMPOSED BY THIS COURT.	
<u>POINT II</u>	18
RICHARDS SHOULD NOT HAVE RECEIVED ATTORNEY FEES FOR CALCULATING HIS ATTORNEY FEES.	
<u>POINT III</u>	23
THE TRIAL COURT SHOULD NOT HAVE AWARDED PRE-JUDGMENT INTEREST TO RICHARDS ON ATTORNEY FEES.	
A. <i>Pre-judgment interest on the fees award is not permissible here.</i>	24
B. <i>Because the court of appeals vacated the original award of attorney fees, no post-judgment interest should have been awarded.</i>	25

<u>POINT IV</u>	27
THE TRIAL COURT COMMITTED ERROR WHEN IT DETERMINED THAT POST-JUDGMENT INTEREST CARRIES THE INTEREST RATE OF THE OLD STATUTE RATHER THAN THE NEW STATUTE.	
<u>POINT V</u>	29
THE TRIAL COURT ERRED BY AWARDING PRE-JUDGMENT INTEREST ON THE BREACH OF WARRANTY DAMAGES.	
<u>POINT VI</u>	32
THE TRIAL COURT SHOULD HAVE OFFSET THE JUDGMENTS SO THAT ONLY ONE NET JUDGMENT RESULTED.	
<u>POINT VII</u>	33
BROWN IS ENTITLED TO FEES AND COSTS ON THIS APPEAL.	
RESPONSE TO ISSUES RAISED BY RICHARDS	33
<u>POINT VIII</u>	34
ASSUMING, ARGUENDO, THAT AN AWARD OF ATTORNEY FEES TO RICHARDS WAS PROPER, THE TRIAL COURT'S AWARD OF TRIAL, APPEAL AND POST-APPEAL FEES TO RICHARDS WAS APPROPRIATE AND SHOULD BE UPHELD.	
A. <i>Richards failed to show that the trial court abused its discretion in the fee award.</i>	34
B. <i>This Court should not consider those issues raised by Richards which are unsupported by any citation to legal authority.</i>	37
C. <i>Richards' claim that the trial court erred in failing to award him fees for his "successful defense of Brown's contract claims" is disingenuous.</i>	38
D. <i>The trial court's award of Richards' fees for his breach of warranty claim is appropriate given the quality of evidence and his refusal to allocate as required.</i>	40

E.	<i>The trial court's findings in this case were sufficient to support the fee award.</i>	44
F.	<i>The court's award of 60% of Richards' appeal and post-appeal fees is sufficient.</i>	45
<u>POINT IX</u>		46
	RICHARDS IS ENTITLED TO RECOVER ONLY TRADITIONAL COSTS.	
<u>POINT X</u>		48
	THE TRIAL COURT PROPERLY AWARDED FEES TO BROWN FOR RESISTING RICHARDS' UNSUCCESSFUL RESCISSION CLAIM.	
<u>POINT XI</u>		49
	RICHARDS SHOULD BE AWARDED NO FEES ON APPEAL	
CONCLUSION		50

TABLE OF AUTHORITIES

CASES CITED

<u>Albert P. Smith Co. v. Albertsons, Inc.</u> , 826 F. Supp. 1299 (D. Utah 1993)	17
<u>Bailey-Allen Co. v. Kurzet</u> , 876 P.2d 421 (Utah App. 1994) ("Bailey I")	2, 26, 27
<u>Bailey-Allen Co. v. Kurzet</u> , 945 P.2d 180 (Utah App. 1997) ("Bailey II")	3, 32, 33
<u>Baldwin v. Burton</u> , 850 P.2d 1188 (Utah 1993)	12
<u>Barker v. Utah Pub.. Serv. Comm'n</u> , 338 Utah Adv. Rep. 3, (Utah 1998)	19
<u>Barnes v. Wood</u> , 750 P.2d 1226 (Utah App. 1988)	18
<u>Beckstrom v. Beckstrom</u> , 578 P.2d 520 (Utah 1978)	37
<u>Bellon v. Malnar</u> , 808 P.2d 1089 (Utah 1991)	30
<u>Bjork v. April Industries, Inc.</u> , 560 P.2d 315 (Utah 1977)	2
<u>BLT Investment Company v. Snow</u> , 586 P.2d 456 (Utah 1978)	49
<u>Brown v. Richards</u> , 840 P.2d 143 (Utah App. 1992)	Passim
<u>Citizens Bank of Maryland V. Strumpf</u> , 116 S.Ct. 286 (1995)	33
<u>Cottonwood Mall Co. v. Sine</u> , 830 P.2d 266 (Utah 1992)	Passim
<u>Dixie State Bank v. Bracken</u> , 764 P.2d 985 (Utah 1988)	1, 18, 35, 38
<u>Equitable Life and Casualty Ins. Co. v. Ross</u> , 849 P.2d 1187 (Utah App. 1993)	36
<u>Frampton v. Wilson</u> , 605 P.2d 771 (Utah 1980)	46
<u>Gardner v. Madsen</u> , 949 P.2d 785 (Utah App. 1997)	49

<u>Gillmor v. Wright</u> , 850 P.2d 431 (Utah 1993)	47
<u>Goddard v. Hickman</u> , 685 P.2d 530 (Utah 1984)	36
<u>Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc.</u> , 766 P.2d 1074 (Utah 1988)	13
<u>Groen v. Tri-O-Inc.</u> , 667 P.2d 598 (Utah 1983)	41
<u>Hatanaka v. Struhs</u> , 738 P.2d 1052 (Utah App. 1987)	46
<u>James Constructors, Inc. v. Salt Lake City Corp.</u> , 888 P.2d 665	19, 24, 25, 30
(Utah App. 1994)	
<u>Kaiser Aluminum v. Bonjorno</u> , 494 US 827 (1990)	28
<u>Living Scriptures v. Cudlik</u> , 890 P.2d 7 (Utah App. 1995)	49
<u>Mark VII Fin. Consultants Corp. v. Smedley</u> , 792 P.2d 130 (Utah App. 1990)	32
<u>Management Servs. Corp. v. Development Assocs.</u> ,	33
617 P.2d 406 (Utah 1980)	
<u>Mason v. Western Mortgage Loan Corp.</u> , 754 P.2d 984	26
(Utah App. 1988)	
<u>McBride v. Superior Court</u> , 635 P.2d 178 (Ariz. 1981)	29
<u>PDQ Lube Ctr. Inc., v. Huber</u> , 949 P.2d 792 (Utah App. 1997)	3
<u>Paul Mueller Co. v. Cache Valley Dairy Ass'n.</u> , 657 P.2d 1279 (Utah 1982)	13
<u>Price-Orem v. Rawlins, Brown and Gunnell</u> , 784 P.2d 465	30, 31
(Utah App. 1989)	
<u>Puget Sound Nat'l Bank v. St. Paul, Etc.</u> , 645 P.2d 1122 (Wash App. 1982)	29
<u>Redevelopment Agency v. Daskalas</u> , 785 P.2d 1112 (Utah App. 1989)	12, 13, 18
<u>Regional Sales Agency, Inc. v. Reichert</u> , 784 P.2d 1210 (Utah App. 1989),	37
vacated on other grounds, 830 P.2d 252 (Utah 1992)	

<u>Robertson v. Gem Ins. Co.</u> , 828 P.2d 496 (Utah App. 1992)	35
<u>Salmon v. Davis County</u> , 916 P.2d 890 (Utah 1996)	Passim
<u>Schafir v. Harrigan</u> , 879 P.2d 1384 (Utah App. 1994)	39
<u>Selvage v. J. J. Johnson & Assoc.</u> , 910 P.2d 1252 (Utah App. 1996)	1, 11, 38, 39
<u>Shoreline Dev. Inc. v. Utah County</u> , 835 P.2d 207 (Utah App. 1992)	24, 30
<u>State v. Ramirez</u> , 817 P.2d 774 (Utah 1991)	35
<u>State v. Reiners</u> , 803 P.2d 1300 (Utah App. 1990)	38
<u>State v. Pharris</u> , 846 P.2d 454 (Utah App.), <u>cert. denied</u> , 857 P.2d 948 (Utah 1993)	35
<u>State v. Wareham</u> , 772 P.2d 960 (Utah 1989)	38
<u>Stephens v. Bonneville Travel, Inc.</u> , 968 P.2d 518 (Utah 1997)	2
<u>Stevens v. Stevens</u> , 754 P.2d 952 (Utah App. 1988)	47
<u>Stewart v. Utah Pub. Serv. Comm'n</u> , 885 P.2d 759 (Utah 1994)	10
<u>Stockton Theatres, Inc. v. Palermo</u> , 360 P.2d 76 (Cal. 1961)	26
<u>Studley v. Boylston Nat. Bank</u> , 229 U.S. 523 (1913)	33
<u>Trayner v. Cushing</u> , 688 P.2d 856 (Utah 1984)	14
<u>Utah Farm Prod. Credit Ass'n v. Cox</u> , 627 P.2d 62 (Utah 1981)	39
<u>Valcarce v. Fitzgerald</u> , Case Nos. 960144, 960201 <u>slip op. at 8 (Utah Modified Opinion Filed June 26, 1998)</u>	36
<u>Willey v. Willey</u> , 951 P.2d 226 (Utah 1997)	36

STATUTES AND RULES

28 USC §1961	28
ARS §44-1201(A)(1979)	29
Rule 24(a)(9) of the Utah Rules of Appellate Procedure	38
Rule 54 U.R.C.P.	46
Utah Code Ann. §15-1-4	7, 27
Utah Code Ann. §63-30a-2	21
Utah Code Ann. §78-2a-3(2)(j) (1996)	1

OTHER AUTHORITIES

<u>Black's Law Dictionary</u> , 5th Ed.	25
---	----

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court by Utah Code Ann. §78-2a-3(2)(j) (1996).

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

Appellees/Cross-Appellants, Boyd J. Brown and Interwest Aviation Corporation ("Brown"), present the following issues for review by this Court on the cross-appeal.

1. *Did the district court err in awarding defendants/appellants ("Richards") attorney fees despite Richards' failure to properly distinguish among compensable successful claims, noncompensable successful claims and unsuccessful claims?*

Standard of Review. A party's entitlement to attorney fees is a question of law reviewed for correctness. Selvage v. J. J. Johnson & Assoc., 910 P.2d 1252, 1257 (Utah App. 1996). The reasonableness of an award of attorney fees is subject to an abuse of discretion standard. Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988).¹ This issue was preserved for review in all of the proceedings which occurred in the trial court after remand by this Court. Specifically, see Plaintiffs' Memorandum in Opposition to Defendants' Motion for Entry of Amended Judgment. (R. 4967-5000)

2. *Did the trial court err in awarding Richards post-appeal fees for attempting to prove the claim for fees, which amounted to a fees for fees award?*

Standard of Review. The reasonableness of the award of attorney fees is subject to an abuse of discretion standard. Dixie State Bank, 764 P.2d at 991. However, some of the arguments here concern a party's entitlement to attorney fees which is a question of law reviewed for correctness. Selvage, 910 P.2d at 1257. This issue was preserved in Brown's

¹In his opening brief Richards framed most of the issues concerning Judge Rigtrup's award of attorney fees as issues to be judged by a correctness standard. Yet, this Court specifically noted in Selvage, a trial court "'has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse of discretion standard'" 910 P.2d at 1257, quoting Dixie State Bank, 764 P.2d at 991.

Memorandum in Opposition to Richards' Motion for Reconsideration and Brown's Memorandum in Support of Plaintiffs' Motion to Strike Richards' Supplemental Memorandum on the Issue of Attorney Fees. (R. 5644-55; 5685-93)

3. *Did the trial court err in awarding Richards judgment interest on attorney fees to begin before the date that such fees were determined by the court?*

Standard of Review. The award of judgment interest presents a question of law which is reviewed for correctness. Bailey-Allen Co. v. Kurzet, 876 P.2d 421, 427 (Utah App. 1994) ("Bailey I"). This issue was preserved for appeal in Plaintiffs' Memorandum in Opposition dated February 3, 1994. (R. 4967-5000)

4. *Did the trial court err in ruling that post-judgment interest carries an interest rate of the applicable interest rate statute in effect at the time of entry of the judgment, despite a subsequent amendment to the statute before entry of the post-appeal judgment?*

Standard of Review. Statutory interpretation by the trial court is reviewed for correctness. Stephens v. Bonneville Travel, Inc., 968 P.2d 518, 519 (Utah 1997). This issue was preserved in Brown's Memorandum in Opposition to Richards' Motion for Reconsideration. (R. 5644-55)

5. *Did the trial court err in awarding pre-judgment interest to run from a date prior to the determination of the amount of the breach of warranty award?*

Standard of Review. A trial court's determination of the date from which interest is to run is reviewed for correctness. Bjork v. April Industries, Inc., 560 P.2d 315, 317 (Utah 1977). This issue was preserved for appeal in Brown's Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Memorandum in Opposition, and Brown's Reply Memorandum. (R. 5171-82; 4967-5000; 5199-5205)

6. *Did the trial court incorrectly refuse to offset Richards' judgment against Brown's judgment so that only one net judgment resulted from this action?*

Standard of Review. This issue presents a question of law which is reviewed for correctness with no deference to the trial court. PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792, 797 (Utah App. 1997); Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180, 192 (Utah App. 1997) ("Bailey II"). This issue was preserved in Brown's Response to Defendant's Latest Motion for Release. (R. 5542)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any constitutional provisions, statutes or rules which are determinative of the outcome of this case are set out in the text or the addenda of this brief.

STATEMENT OF THE CASE

This case arose out of the sale of the business assets and building of Interwest Aviation, a fixed base operation at Salt Lake International Airport. The case was tried to a jury, Judge Kenneth Rigtrup presiding, for eight weeks in early 1989. The jury returned its verdict in the form of answers to interrogatories. (R. 2808-21) Judge Rigtrup entered an initial judgment on December 21, 1989. (R. 3090-116) Following several post-trial proceedings, Judge Rigtrup entered final judgment on October 18, 1990. (R. 4072-102)

Richards appealed and Brown cross-appealed the trial court's final judgment. The appeal was decided by this Court on August 24, 1992 in Brown v. Richards, 840 P.2d 143 (Utah App. 1992). While that appeal resolved many of the issues presented by the parties, the award of attorney fees to Richards was vacated and remanded to the trial court as was the issue of fees Brown may be entitled to on the rescission issue. Brown, 840 P.2d at 156.

After Brown filed unsuccessful petitions for rehearing and for a writ of certiorari, the case was remitted to the trial court on March 25, 1993. (R. 4316-17)

Following extensive filings by both sides and discovery, the trial court held an evidentiary hearing on attorney fees on January 31, February 1, 2, and 3, 1995. (R. 6049-52) Judge Rigtrup issued an oral ruling on April 1, 1996. (R. 5552-56; Addendum A) Richards then filed a “Motion for Further and Reconsideration” on April 26, 1996. (R. 5585-88) More filings ensued and the trial court held another hearing on June 17, 1996. (R. 6054) On December 31, 1996, the trial court issued a signed minute entry with its decision and reasoning. (R. 5706-16; Addendum B) On March 21, 1997, Judge Stephen Henriod, who took the case on Judge Rigtrup’s retirement, entered findings and conclusions, which mirrored the December 31 minute entry, (R. 5876-83; Addendum C) and entered final judgment disposing of all remaining issues. (R. 5867-75; Addendum D)

Dissatisfied with the amount of attorney fees awarded to him, Richards appealed. Brown cross-appealed the erroneous interpretations of Utah law by the trial court.

FACTS

The fact statement provided by Richards in his opening brief is neither complete nor entirely accurate. The following clarifies and supplements the facts set out by Richards.

The parties entered into not two, but at least ten separate agreements involving the sale of Interwest Aviation. Those agreements are listed in a summary reprinted in the addenda. (Addendum E) The February 1, 1984 Purchase Agreement, was for the separate sale of a Gulf Stream Aero Commander. (Plaintiff’s Exhibit 16) While no judgment resulted

from that agreement, there was much testimony regarding the airplane and Brown's reputation that went to Richards' efforts to prove fraud (R. 6050, p. 232). This testimony had nothing to do with the Asset Sale Agreement under which Richards' successful breach of warranty claim entitled Richards to attorney fees. Brown, 840 P.2d at 156 n 12. Richards' counsel confirmed the essence of Richards' case by telling the jury that "This was a fundamentally fraudulent transaction." (R. 4226, p.5209)

One of Richards' initial counterclaims was for rescission, but this claim was eventually dismissed. (R. 1108) This Court, in its prior opinion, noted that Brown should be awarded his fees for successfully defending this rescission claim. 840 P.2d at 156.

This Court directed Richards on remand to "set out time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." Brown, 840 P.2d at 156 n.12. Richards' claim for attorney fees did not conform to these requirements. Richards' attorneys admitted using a 30% apportionment, initially made by the trial court before the first appeal, for work involving the real estate contract. (R. 6047 p.45) Richards' attorneys did not apportion any time for factual development of the real estate claims. (R.6050, p. 236) Richards' attorneys admitted "we have made no delineations between those portions of the work as to which we were unsuccessful." (R.6050, p. 240) Richards' attorneys never fully allocated time between contract issues and fraud issues and did not keep track of any of the work they did by specific claim. (R. 6049, p.87) Richards' attorneys

admitted that they made no reductions for their efforts to lift the judgment lien on Richards' property, (R.6050, p. 249-250) and that despite this Court's decision, they included fees for the failed rescission efforts. (R. 5225) They made no effort to reduce time spent obtaining reputation evidence and they made no effort to distinguish between the apparent shield of substantial performance and the sword of fraud. (R.6050, p. 249-50, 269-270) Therefore, the billing records kept by Richards' counsel were admittedly incapable of supporting allocations required. (R. 6050, p. 82)

Consequently, Richards' counsel tried to reconstruct their efforts and justified the effort by alleging overlapping issues. Brief of Appellant at 28, 32. Despite Richards' counsels' testimony that they were skilled in complex litigation (R.6049, at 16), knew the controlling case law (R.6049, p. 80), knew at once that this case had a blend of compensable and non-compensable issues (R.6049, p. 22-23) and represented insurance companies during this time period (R.6049, p. 73-74), the underlying records which they kept did not allocate time between specific compensable and non-compensable claims. This led the trial court to find the evidence submitted by Richards' attorneys was "admittedly not in conformity with the court of appeals' remand instructions" (R. 5707)

Brown presented the testimony of George Naegle who testified that insurance companies in the late 80's were prohibiting the very sort of "block billing" in which Richards' counsel engaged.² (R. 6050, p.281-7) This block billing prevented the accurate allocation of time and effort as required on remand.

²In block billing only one time entry is made for work done per day, with a description of all activity completed and no allocation of time per task.

Richards' counsels' failure to accurately record their time and efforts by claim or even a reasonable description of their efforts, led to reliance in their fee application on arbitrary percentages. (R. 6050, p. 181-2; p. 177; R. 5126-9) The trial court discarded Brown's suggested percentages (R. 4973, 4981) and relied upon its own percentage allocation after having presided over the trial. (R. 5706-16)

On August 29, 1994, the court decided Richards would receive pretrial interest on his breach of warranty damages and prejudgment interest on his undetermined attorney fees. (R. 5304) Following the early 1995 evidentiary hearing, the court awarded Richards a percentage of his claimed trial and appeal fees, no fees for fees, reversed the award of pre-judgment interest on fees, and awarding traditional costs. (R. 5552) Richards filed a "Motion for Further and Reconsideration." The court heard this motion on June 17, 1996, (R. 6054) and ruled by minute entry dated December 31, 1996. (R. 5706) It restored pre-judgment interest on Richards' fees (R. 5710) and, in another reversal, awarded Richards a percentage of his claimed fees for fees. (R. 5708-10) Judge Rigtrup, who retired on that date, directed that his successor, Judge Henriod, sign the approved findings and judgment. Both were signed and entered on March 21, 1997. (R. 5867; R. 5876)

At the time the original final judgment was entered in October, 1990, the Utah Judgment Interest Statute, Utah Code Ann. §15-1-4, provided for 12% post-judgment interest on non-contract claims. During the first appeal to this Court, the Utah legislature amended that statute to tie the judgment interest percentage to that used by the federal court on a specific date each year. Judge Rigtrup's decision on judgment interest, interpreted the interest

statute to apply from the date the original judgment was entered and not subject to yearly charge. (R. 5304; R. 5873) Judge Rigtrup did not allow the judgments to be consolidated in one offsetting amount with one interest rate. (R. 5875)

SUMMARY OF THE ARGUMENT

On the cross-appeal, Brown maintains that the trial court abused its discretion when it awarded Richards any attorney fees because Richards' fee evidence did not conform to this Court's remand requirement that Richards allocate his fees among compensable claims which were successful, compensable claims which were unsuccessful and noncompensable claims. Richards did not do this.

The trial court erred when it awarded Richards attorney fees for calculating his attorney fees. The controlling case was misinterpreted by the trial court and is distinguishable from this case. Richards' initial failure to properly allocate fees started the chain of events resulting in the protracted proceedings here. Richards should not now be rewarded for his unsuccessful attempt to reconstruct flawed records.

The trial court should not have awarded interest on Richards' attorney fees from the date of the original judgment. The amount of the fees was not known with mathematical certainty until determined by the trial court. Since the original award of fees was vacated, Richards' entitlement to a specific fee amount was not known until the trial court ruled.

The trial court should have calculated interest on the various judgments by applying the amended statutory interest rate each year rather than maintaining the rate in effect at the time of the 1990 judgment. Courts which have permitted the original interest rate to remain

in effect for the life of the judgment have relied on specific statutory language which is absent in the Utah statute. Such absence indicates the legislature's intent that the annually revised judgment rate apply to all judgments, not just new ones.

The trial court erred when it awarded pre-judgment interest on Richards' breach of warranty damages. These damages were not calculable with mathematical certainty until they were determined by the jury and, therefore, pre-judgment interest should not have been awarded. This interest was not awarded to Richards in 1990 and Richards did not appeal that decision in the first appeal.

The trial court should have combined the various judgments into one net award in favor of Brown, with contract interest. This Court has said that one judgment should be rendered unless the claim and counterclaim are totally unrelated, not the case here.

Finally, on the cross-appeal, Brown asserts that he should be awarded fees for this appeal as the prevailing party in the trial court and on appeal.

With respect to the issues raised by Richards: Brown asserts if an award of any attorney fees to Richards is appropriate, the amount determined by the trial court should be affirmed. Richards has failed to show the trial court abused its discretion in the award of fees. The arguments in Richards' brief on the attorney fees issues are not supported by citation to authority required by the Utah Rules of Appellate Procedure. Richards' complaints regarding the award of attorney fees fail to acknowledge his own failure to comply with the remand requirements. The amount awarded by the trial court is appropriate in light of the nature of Richards' case, which primarily concerned fraud, a non fee compensable claim.

Richards is entitled only to costs as that term is traditionally used. When this Court vacated the award of attorney fees, the inseparable cost award was also vacated. Furthermore, the trial court corrected an earlier mistake in its award of costs to Richards.

Brown contends that the trial court's award of attorney fees to him on the rescission claim, should be affirmed. The fees are not duplicative of prior fees.

Finally, Richards deserves no attorney fees on appeal because of his failure to keep adequate records. Any award of fees on appeal would be a windfall to Richards.

ARGUMENT

On cross-appeal, Brown raises the following issues, some of which are determinative of Richards' appeal.

POINT I

RICHARDS IS NOT ENTITLED TO ANY ATTORNEY FEES BECAUSE EVIDENCE SUPPORTING HIS FEE APPLICATION ON REMAND DID NOT MEET THE REQUIREMENTS IMPOSED BY THIS COURT.

Richards should not have been awarded any attorney fees because he did not meet the requirements imposed by this Court.³ The rule in Utah is that "attorney fees cannot be recovered by a prevailing party unless statute or contract authorizes such an award." Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994). Conversely, attorney fees are not recoverable by a party who prevails on a fraud claim in connection with a contract.

³ This Court stated that Richards was "entitled to attorney fees." 840 P.2d at 157. However, that conclusion was based on the court's holding that Richards prevailed on fee-compensable issues. On the current appeal, Brown is asserting that Richards should not receive attorney fees because the evidence he submitted after remand lacked the allocations by this Court.

Selvage v. J. J. Johnson & Assoc., 910 P.2d 1252, 1264 (Utah App. 1996). Furthermore, a party seeking an award of attorney fees "must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claim been successful, and (3) claims for which there is no entitlement to attorney fees." Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269-70 (Utah 1992); Brown at 156. Finally, a party who requests an award of attorney fees "has the burden of presenting evidence sufficient to support the award." Cottonwood Mall, 830 P.2d at 268. In this case, fees were awarded pursuant to a contract provision.⁴ This Court stated that on remand Richards was required to establish time and fees expended in the three categories identified in Cottonwood Mall. Brown, 840 P.2d at 156 n 12. Richards not only failed to allocate his time and fees as required, but the record also demonstrates that Richards' attorneys would never be able to so allocate because the method used to bill Richards ignored the law on attorney fees.

At this point, it is necessary to distinguish between this issue and Point VIII below. In this point Brown argues that the trial court abused its discretion in awarding *any* attorney fees to Richards while in Point VIII Brown asserts that, if any award was appropriate, the trial court did not abuse its discretion *in the amount* of attorney fees awarded to Richards. These positions are not inconsistent. In fact, the argument raised here is a threshold to the argument in Point VIII and, if accepted, precludes consideration of the fee issues raised by

⁴ The provision stated, "In the event suit is brought to enforce the provisions of this agreement, the prevailing party in such action shall be entitled to recover its reasonable attorney's fees and costs incurred in connection therewith." Brown, 840 P.2d at 154.

Richards. In Redevelopment Agency v. Daskalas, 785 P.2d 1112, 1126 (Utah App. 1989), this Court stated, “an award [of attorney fees] made without adequate supporting evidence constitutes an abuse of discretion and must be overruled.” See also Baldwin v. Burton, 850 P.2d 1188, 1199 (Utah 1993) (a trial court's award must be based upon supporting evidence in the record). Thus, the trial court was without the required supporting evidence and abused its discretion in awarding fees. On the other hand, if this Court holds that Richards did not have to allocate his fees as required, Brown maintains in Point VIII that the *amount* of fees the trial court awarded was not an abuse of discretion given the fractured evidence presented by Richards and the trial court’s advantaged position to determine fees.

In cases involving multiple issues and/or multiple parties, the type of evidence which must be presented to justify an award of attorney fees must be quite detailed. In Cottonwood Mall, the court reversed the trial court's award of attorney fees “[b]ecause the evidence was not sufficient to support a finding that the attorney fees were reasonable. . . .” 830 P.2d at 269. There, attorney fees were being sought pursuant to a lease agreement which permitted an award of attorney fees for three kinds of legal work. Id. The supreme court stated that while Cottonwood Mall initiated the action to regain possession of the premises, for which attorney fees were permitted under the lease, the trial of the case addressed some issues which were unrelated to the lease. In its request for attorney fees, Cottonwood Mall “did not distinguish between work that was subject to a fee award and work that was not.” Id. The supreme court emphasized that a party seeking an award of attorney fees in a multi-issue case must “set out the time and fees spent” for successful compensable claims,

unsuccessful compensable claims and non-compensable claims. 830 P.2d 269-70, quoting Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988). Cottonwood Mall had not sufficiently distinguished among the three categories to support an award of attorney fees. See also Paul Mueller Co. v. Cache Valley Dairy Ass'n., 657 P.2d 1279, 1288 (Utah 1982) (A significant reduction in requested fees upheld because the trial court had "sufficient information before it in the billing records to enable it to separate the [unrecoverable] counterclaim hours from those spent on the defense of the main causes of action.") Finally, as noted, it is an abuse of discretion to base an award of attorney fees on inadequate evidence. Redevelopment Agency, 785 P.2d at 1126.

In Brown, this Court appeals specifically vacated the trial court's prior award of attorney fees to Richards because the trial court's previous findings did not "indicate what work was actually performed in relation to the contractual claims upon which Richards prevailed and that it was necessary . . ." 840 P.2d at 156. This Court also noted that this was a complex matter involving the adjudication of multiple claims arising under several contracts with each party winning on some issues and losing on some issues. In vacating and remanding for recalculation of Richards' fees, this Court specifically stated that Richards must separate the time and fees according to the formula in Cottonwood Mall. 840 P.2d at 156 n.12. Richards simply has not done that.

Richards is only entitled to fees under the breach of warranty claim, not on his fraud claim, his claim of breach of fiduciary duty or any of the issues on which he did not prevail or on which Brown prevailed, such as the real estate and rescission issues. The evidence

Richards presented on remand did not allocate attorney time or fees into the three Cottonwood Mall categories. In fact, the trial court found Richards' "proofs presented at the remand hearing were admittedly not in conformity with the remand instructions" (R. 5707) Richards could not make the required allocation because his attorneys did not keep records which divided time between compensable and non-compensable claims.

Richards' attorneys knew the law concerning attorney fees. During his testimony at the January 31, 1995 hearing on the issue of attorney fees, Richards' lead attorney, Robert S. Campbell, stated he had reviewed and knew the standards for award of attorney fees in Utah, (R. 6049, at 19, 20), he knew that no recovery of attorney fees was available for tort claims (R. 6049 at 106), and he knew immediately after his initial conference with Richards that the case involved both contract and tort claims (R. 6049 at 22-23). Mr. Campbell admitted he did not ever keep track of his time by specific claim (R. 6049 at 40) and that he never discussed with his partners and associates whether time recorded on their time sheets should be allocated between the breach of contract claim and the fraud claims. (R. 6049 at 87)

The only reason given by Richards' attorneys for not keeping track of their time by specific claim was because it was "impractical" to do so. (R.6049, p.40) In essence, Richards' attorneys claimed they were not required to follow Utah law, which required an allocation of attorney time and expenses between compensable and non-compensable claims. In light of the cases dating to at least 1984 see, e.g., Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984), this excuse is simply untenable. In the face of Mr. Campbell's admissions, one can only conclude that the decision not to keep track of the time by specific claim was made in

the hope of recovering all fees. Indeed, Richards' attorneys espoused such a belief. Elizabeth T. Dunning testified at her deposition that even if the jury had awarded Richards nothing for fee-compensable breach of warranty damages, she believed Richards would still be entitled to an award of attorney fees! (R. 5227-8) Richards' attorneys continue to believe that they are entitled to recover all of the attorney fees for any time spent on this case. See, e.g., Brief of Appellant at 30 n.3, 35.

Richards' attorneys engaged in "block billing" in which all of the time spent in any one day on a client's case is billed as one block of time and no allocation is made among individual claims, whether they are compensable or not. (R. 5709) Not only did Richards' attorneys "block bill" their client, it seems that the underlying time sheets, which were never made available to the trial court, also made no allocation among the claims, which Richards was pursuing. In other words, the attorneys never separated work on the one claim, breach of warranty, for which Richards could recover fees, from other contract issues or from the tort claims which formed the bulk of Richards' case. (R. 5553, p.6-7)

The inadequacy of Richards' fee evidence is also illustrated by the testimony of Ms. Dunning. Ms. Dunning admitted: that her predecessor's work in opposing Brown's early motion to dismiss the fraud claims was not properly deleted (R. 5225-6); that no effort was made to delete the work involved in proving fraud (R. 5226-7); that the fees for the failed rescission effort were included (R. 6050 p. 189-92); that there was no deletion for trial time spent on witnesses who testified about Hobbs meters on three non-inventory airplanes (such testimony was *not* illustrative of any contract damages) (R. 5226); and that no deductions

were made for trial time spent with witnesses who gave evidence other than that necessary to prove breach of warranty (R. 6050, p. 230) These admissions and Mr. Campbell's admissions show the disregard of the allocation criteria imposed by this Court.

The lack of compliance with this Court's requirement of allocation and the effects of block billing can be further illustrated by examining three random days of billing records supplied by Richards' attorneys. 1) On April 16, 1988, attorney Frank Smith (Dunning's predecessor) billed 8.1 hours for: "Conference with D. K. Richards regarding preparation for J. Sharp deposition; interview J. Sharp and take deposition; follow-up telephone conference with client to report deposition results." (R. 4660 Addendum F) Parts of John Sharp's deposition were read by Richards at trial, and that testimony had nothing to do with breach of warranty claims or damages, yet all 8.1 hours of attorney Smith's time were deemed compensable by Richards in his submissions following this Court's remand. 2) On August 6, 1988, after Ms. Dunning took over for Mr. Smith, Mr. Campbell billed 2 hours for "Conference with client; review case with Franklin N. Smith, Jr. and Elizabeth T. Dunning." Ms. Dunning also billed 2.0 hours for "Office conference with Franklin N. Smith, Jr., Robert S. Campbell, Jr. regarding status of case." (R. 4677 Addendum G) Each attorney billed for the same conference. No reductions and no explanations were made to explain what was discussed in these entries, why this meeting was necessary to prosecute breach of warranty or why each attorney was allowed to bill for what appeared to be duplicative time. Every part of each attorney's time that day was spent in getting Ms. Dunning "up to speed." Applying Utah law, Judge Thomas Greene stated "it is not reasonable to require [the

opposing party] to pay the attorney fees incurred by new . . . counsel 'getting up to speed' with the facts and issues of the case." Albert P. Smith Co. v. Albertsons, Inc., 826 F. Supp. 1299, 1301-02 (D. Utah 1993). 3) On December 5, 1988, Ms. Dunning billed 7.3 hours: "Review Brown Deposition; hearing on Motion for Extension of Discovery; office conference with Foote; telephone conference with Smith regarding witnesses; review Sharp deposition; draft memorandum regarding witnesses; office conference with Carolyn Cox; office conference with Robert S. Campbell, Jr.; telephone conference with D. Richards." (R. 4697 Addendum H) Of the 7.3 hours billed, a 50% reduction was entered for only 1 hour. Yet, the entry reveals no indication of what discovery Ms. Dunning worked on, which witnesses the memorandum concerned, what her discussion with Ms. Cox concerned, or why the deposition was reviewed. On that same day Ms. Cox billed two hours for "Office conference with Elizabeth T. Dunning regarding documents; review of documents list." (Id.) This entry does not clarify what documents were discussed or reviewed in the conference or how those documents related solely to the breach of warranty claim.

This type of analysis of the billing statements Richards supplied to the trial court on remand can be repeated for each of the hundreds of pages. They amply demonstrate Richards' inability to make the required allocation. The evidence supplied by Richards' attorneys is simply inadequate to support an award of attorney fees. None of these records specifically identifies time which was spent on the breach of warranty claim. Richards' attorneys made only a minimal effort to reduce the fees which they requested to reflect the amount of time spent on the breach of warranty claim. Some reductions were made when

the word "fraud" specifically appears in the billing records, but no entry supports the proposition that the time expended was spent solely on the breach of warranty claim.

Brown had proposed to the trial court that Richards be required to prove the time spent on fee-compensable claims, an approach which seems to be suggested by the case law, rather than being allowed to start with the total time spent and simply make after-the-fact reductions based primarily on guesswork. (R. 4970, et seq.) However, the trial court shunned this bottom-up approach meaning haphazard reductions were made.

An examination of Richards' fee claims for attorney fees demonstrates that Richards claimed that nearly 80% of his fees should be awarded for an issue on which the recovery was less than 10% of the total award, and on which very little time was devoted at trial.

Because Richards' attorneys were unable to make the required allocations, the trial court had no evidence to support an appropriate allocation of attorney fees for compensable and non-compensable claims. The award of any attorney fees to Richards was "without adequate supporting evidence constitutes an abuse of discretion and must be overruled." Redevelopment Agency, 785 P.2d, at 1126. See also Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); Barnes v. Wood, 750 P.2d 1226, 1233 (Utah App. 1988).

POINT II

RICHARDS SHOULD NOT HAVE RECEIVED ATTORNEY FEES FOR CALCULATING HIS ATTORNEY FEES.

Richards should not have been allowed to benefit from his disregard of the remand when he failed to allocate time among compensable and non-compensable claims and unsuccessful claims, by then being awarded attorney fees for hundreds of hours spent in

futilely attempting to make such an allocation after the fact. Utah courts have granted attorney fees for the calculation and proving of fees only in very limited circumstances. Salmon v. Davis County, 916 P.2d 890 (Utah 1996) (Permitting an award of attorney fees for fees pursuant to a specific statute.); James Constructors, Inc. v. Salt Lake City Corp., 888 P.2d 665 (Utah App. 1994) (Permitting fees for fees pursuant to a specific indemnity agreement between the parties.). But see Barker v. Utah Pub. Serv. Comm'n, 338 Utah Adv. Rep. 3 (Utah 1998) (Denying a fees for fees application in a case in which the original attorney fees came from a "common fund.").

The trial court initially denied Richards' request for attorney fees incurred during his futile attempt to meet this Court's allocation requirements. (R. 5553,4) However, in its December 31, 1996 Minute Entry, subsequent to Richards' motion for reconsideration, the trial court stated:

The Court has reconsidered its rulings on post-appeal fees and costs in light of the majority opinion of the Utah Supreme Court in the case of David L. Salmon v. Davis County, et al., 916 P.2d 890 (in Utah 1996). In view of the majorities' [sic] allowance of fees incurred in seeking fees, the Court revisits the post-appeal fee and cost issue.

As in all other fee claims, Richards' attorneys adduced evidence on the number of hours spent, their hourly rates, previously found by the Court to be consistent with those rates customarily charged in the community, and they generally describe the tasks performed, or services rendered. The billing to the clients were submitted in support of the time and services involved. The overall time expended by counsel post-appeal has been questioned by plaintiffs' counsel.

In the announced decision of April 1, 1996, the claim for \$78,169.32 was disallowed by the Court for failure to allocate time and services. On reflection, the Court concludes it was wrong. Except for time expended on post-judgment lien and security problems and the form and content of supplemental Findings, Conclusions and post-appeal Judgments which includes some other issues involving accounting, interest computation, and possibly

others, the substantial time and efforts of Richards' attorneys has been directed to the attorney's fee, costs and relevant interest issues.

(R. 05708-9) In its March 21, 1997 Findings of Fact, the trial court found:

12. The Court has reconsidered Richards' claim for post-appeal fees in light of the Utah Supreme Court's opinion allowing fees incurred in seeking fees in Salmon v. Davis Co., 916 P.2d 890 (Utah 1996).

13. The substantial time and efforts of Richards' attorneys post-appeal, except for time expended on post-judgment lien and security issues, on the form and content of supplemental Findings, Conclusions and Post-Appeal Judgments (which include other issues involving accounting, interest computation, etc.), have been directed to attorney fees, costs and relevant interest issues.

(R. 5880) Based on these findings the court reached the conclusion that:

3. Defendants seek attorneys fees and costs incurred in post-appeal matters from November 1, 1993 through February 1, 1995 in the amount of \$78,169.32. This amount is excessive and unreasonable. The Court finds that 60% of that amount, or \$46,901.59, is reasonable, with interest at 10% per annum from and after July 1, 1995 to the date of the post-appeal Judgment.

(R. at 5881)

The trial court's findings and conclusions regarding the awarding of Richards' attorney fees for the calculation of fees is based on an erroneous reading of Salmon. A proper reading of Salmon discloses: (1) the reasoning supporting the award of fees for fees in Salmon is not at all clear because of the supreme court's fragmentation, (2) the basis for the award of fees in Salmon was not the same as here, and (3) concerns raised in Salmon are present here. A close analysis of Salmon demonstrates its result is inapplicable here.

The reasoning which supported the award of fees expended to obtain attorney fees in Salmon did not command a majority of the Utah Supreme Court. See Salmon, 916 P.2d at 900 (Zimmerman, C.J. concurring). Salmon involved the specific interpretation of a

statute, Utah Code Ann. §63-30a-2, which provided the sole basis for entitlement to fees. In contrast, fees in this case were awarded pursuant to contract. In Salmon, Justice Durham (writing for herself and Justice Stewart) concluded that the statute in question must be broadly construed to allow an award of attorney fees necessarily incurred in litigating to recover fees initially provided by the statute to prevent rendering such a fee shifting statute impotent. 916 P.2d at 894-96. Specifically, Justice Durham stated: “Consequently, if a vindicated employee is required to expend attorney fees to recover the original fees to which he was entitled, the cost of these subsequent fees must also be reimbursed. Any other interpretation would eviscerate the purpose of the statute.” 916 P.2d at 896. Justice Durham’s concern was heightened by the small amount of fees recovered in Salmon, something that is not a consideration here. However, in concurring in that result Chief Justice Zimmerman placed Justice Durham’s concerns in perspective and pointed out a significant *dissimilarity* to the “normal contract case”:

Justice Durham analogized Salmon's case to typical cases where attorney fees incurred on appeal are awarded whenever attorney fees were initially authorized by statute or contract. . . .

However, Salmon could not raise the attorney fee issue in the underlying proceedings [in this case] because the County [from which he sought attorney fees] was not a party to the underlying criminal actions against him. This anomaly sets §63-30a-2 apart from the vast majority of our cases which rely on a statutory or contractual provision for attorney fees, where the attorney fee issue can be litigated in the same proceeding as the substantive right to which this award of fees is attached.

. . . .

Finally, an award of a reasonable fee for seeking defense fees will not encourage exorbitant fee requests or generate needless litigation. In determining a reasonable fee for the fee litigation, a district court has the discretion to assess whether the fee requested for the fee litigation is reasonable and whether the employee or employer unreasonably generated or

protracted the fee litigation.

916 P.2d at 901-02. Justice Zimmerman's reasoning effectively distinguishes Salmon from this case.

The county in Salmon exacerbated the attorney fees incurred by Salmon when it refused to submit the dispute to arbitration, disputed the amount which he claimed, and finally recommended that Salmon file a complaint to obtain a judicial ruling on the reasonable fees sought in order to disgorge fees from the county. 916 P.2d at 892. In other words, it was the opposing party, the county in Salmon's case, that "ran up the bill." Here, failure of the trial court to enter proper findings on Richards' fees forced the court of appeals to vacate the original fee award to Richards and remand the case for appropriate findings taking the three allocation categories into account. It was because the billings to Richards failed to make such an allocation that the allocation then attempted by Richards counsel consumed hundreds of hours' time, for which Richards now has received partial compensation. Here it was Richards, the party seeking fees, who "ran up the bill." It would not be proper to require Brown, a party who, unlike the county in Salmon, had no control over how much subsequent fees were incurred to obtain fees to pay the bill for Richards' attorneys doing so.

Chief Justice Zimmerman made a second point in Salmon which also distinguishes that case. He noted that "an award of a reasonable fee for seeking defense fees will not encourage an exorbitant fee request or generate needless litigation." 916 P.2d at 902. This Court required Richards to make an appropriate allocation among compensable claims, non-compensable claims, and unsuccessful claims. As a result, Richards' attorneys billed over

\$78,000.00 in their failed attempt to make the required allocations, which should have been simply a matter of reviewing allocated time records. Had Richards' experienced attorneys followed the law from the beginning of this case and made appropriate allocations on their time and billing sheets, this matter would never have been raised in the first appeal. It was Richards' attorneys' failure to follow the law that necessitated the subsequent proceeding on attorney fees. Richards' attorneys were therefore allowed to spend hundreds of hours and tens of thousands of dollars to attempt to do that which should have been initially done but could never be done. To allow Richards now to benefit from his counsels' failure to follow the law is the grossest miscarriage of justice.

Allowing reimbursement of fees for recovery of fees in a case such as this opens a Pandora's Box. In a case in which an attorney obtains a fee award which the attorney believes, for whatever reason, to be insufficient, a strong temptation exists to spend an inordinate amount of time in the calculation of attorney fees to increase the recovery to a level the attorney may perceive as more reasonable. For this reason alone, fees incurred to calculate fees in a case such as this should not be awarded.

POINT III

THE TRIAL COURT SHOULD NOT HAVE AWARDED PRE-JUDGMENT INTEREST TO RICHARDS ON ATTORNEY FEES.

Richards should not have been awarded interest on attorney fees, to accrue before the amount of attorney fees was ascertainable. An award of prejudgment interest is proper only if the loss can be fixed as of a definite time and can be calculated with mathematical accuracy. "[W]hen damages are uncertain or speculative until fixed by the fact finder, Utah

courts refuse to award prejudgment interest." James Constructors, 888 P.2d at 671. See also Shoreline Dev., Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. 1992). Further, Richards' initial fee award was vacated and had to be computed by the trial court.

In this case, the trial court considered James Constructors and concluded that "prejudgment interest on attorney fees is appropriate." (R. 5882) The trial court awarded accrued contract judgment interest at 10% per annum on the trial fees from the original October 18, 1990 judgment (R. 5874) The court also permitted prejudgment interest at 10% per annum to be awarded from February 3, 1995 on the appeal and post-appeal fees. (*id.*) In making the awards of interest on the fees, the trial court not only misinterpreted James Constructors but misunderstood the ruling of this Court in the first appeal.⁵

A Pre-judgment interest on the fees award is not permissible here.

The trial court's reliance on James Constructors in awarding interest on fees was misplaced. In James Constructors, this Court analyzed prior cases on pre-judgment interest on attorney fees, and concluded that those cases did not adequately address whether such interest was available for a fee award. The court looked to cases from other jurisdictions which have "consistently denied pre-judgment interest award on attorney fees when payment of the fees is contingent on a court's determination of their reasonableness." James

⁵The terminology "pre-judgment" and "post-judgment" is somewhat confusing here. The interest on Richards' award of trial attorney fees can be seen in one aspect as post-judgment interest since it originated from the date of the original judgment. However, in another context the interest should be seen as pre-judgment interest since the interest predates the 1997 judgment of the trial court. This requires analysis of two lines of cases, one concerning pre-judgment interest and the other concerning the award of post-judgment interest. Under either line of cases, Richards should not accrue interest on an award of attorney fees before the 1997 judgment.

Constructors, 888 P.2d at 672. Ultimately, this Court held that when the amount of fees can only be fixed when found reasonable by the trial court, the party awarded fees is not entitled to pre-judgment interest. James Constructors, 888 P.2d at 673.

The trial court in this case was similarly tasked with determining on remand the reasonableness of Richards' fees. Brown, 840 P.2d at 156. As in James Constructors, Brown contested the reasonableness of virtually every aspect of Richards' requested fees. Therefore, until the trial court found those fees to be reasonable (and in some instances it found them to be unreasonable, (R. 5710; R. 5553, p.7-8)), the attorney fees could not be fixed and therefore, should not have accrued pre-judgment interest.

B. *Because the court of appeals vacated the original award of attorney fees, no post-judgment interest should have been awarded.*

In this case, the court of appeals vacated the award of attorney fees to Richards because of the trial court's findings supporting the award were inadequate. Black's Law Dictionary, at 1388 (5th Ed.), defines "vacate" to mean: "2. Annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment." Richards' entire fee claim was therefore before the trial court on remand and solely dependant upon Richards' supporting evidence. From that evidence, the trial court could find that Richards would receive no fees.

The Utah Court of Appeals has suggested the following general rule regarding the determination of interest following an appeal:

A judgment bears legal interest from the date of its entry in the trial court even though it is still subject to direct attack. When a judgment is modified upon appeal, either upward or downward, the new sum draws interest from

the date of entry of the original order, not from the date of the new judgment. On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment.

Mason v. Western Mortgage Loan Corp., 754 P.2d 984, 986 (Utah App. 1988) (quoting Stockton Theaters, Inc. v. Palermo, 360 P.2d 76, 78 (Cal. 1961)).

In Mason the trial court ruled in favor of Western; however, the appellate court reversed and remanded to the trial court for entry of judgment in Mason's favor and determination of damages. Subsequently, the trial court entered judgment for Mason for damages and judgment interest. Mason, 754 P.2d at 985. In deciding Mason, this Court stated that it would follow the majority approach, holding that following reversal, judgment interest was appropriate only as of the date of entry of the new judgment, rather than as of the date of the original judgment. Id. at 986.

Mason and its progeny, Bailey-Allen Co. v. Kurzet, 876 P.2d 421, (Utah App. 1994) (Bailey I), stand for the proposition that in any case remanded to the trial court, judgment interest dates only from the entry of the new judgment. In this case, this Court clearly stated that it was "vacating" the award of attorney fees and remanding the case to the trial court for reconsideration. This Court upheld Richards' general entitlement to attorney fees under the contract but remanded it to the trial court for failure to provide adequate findings supporting the award. Brown, 840 P.2d at 155-56. Because the trial court on remand still had to determine whether Richards' evidence justified the requested fees, the action of the appellate court may be properly characterized as an abandonment of the initial fee award to Richards. Thus, it was entirely possible that the trial court could have, and (as argued in

Point I) should have, found that Richards was entitled to no fees because of his failure to make the required allocations. In Bailey I, an original judgment had been entered in favor of the plaintiff in the trial court. The appellate court held that if the trial court on remand found that damages were still appropriate upon following the proper legal standards, judgment interest should be awarded from the date of entry of the new judgment only. 876 P.2d at 427. This, the court treated the case as a reversal, even though any decision on remand would be in favor of the same party who won at trial exactly the situation here.

As set by Bailey I, in this jurisdiction any reversal, such as in this case, which could result in no fees being awarded is an abandonment of the initial judgment, meaning that any interest on a new judgment should run only from the date of that judgment.

POINT IV

THE TRIAL COURT COMMITTED ERROR WHEN IT DETERMINED THAT POST-JUDGMENT INTEREST CARRIES THE INTEREST RATE OF THE OLD STATUTE RATHER THAN THE NEW STATUTE.

Brown contends that the trial court's conclusion to use the judgment interest rate in effect at the time of the original judgment was erroneous. This is an issue of first impression in this jurisdiction.

During the proceedings on remand, the statutory judgment interest rate changed. The prior Utah statute, Utah Code Ann. §15-1-4, provided: "[Non-contract] judgments shall bear interest at the rate of 12% per annum." The May 3, 1993 modification of that statute provided: "[Non-contract] judgments shall bear interest at the federal post-judgment interest rate of January 1 of each year, plus 2%." Utah Code Ann. §15-1-4 (1996). Brown sought to

have all non-contract awards to Richards be subject to this change. (R. 5644-55)

In his memorandum to the trial court Richards cited Kaiser Aluminum v. Bonjorno, 494 US 827 (1990), for the proposition that when there is a legislative modification of the judgment interest rate during an appeal, the post-appeal judgment must bear the original rate of interest and not the modified interest rate. The trial court evidently also relied on that case in deciding to apply the original interest rate to judgments in this case. (R. 5711)

However, Kaiser Aluminum was based on a 1982 change in the *federal* judgment interest statute, 28 USC §1961, providing: "Such interest shall be calculated from *the date of entry* of the judgment at a rate equal to [the T-bill rate] settled immediately prior to date of the judgment." (Emphasis added.) Far different from federal statute, the Utah statute contains no reference to "date of entry." The lack of such language in the Utah statute renders the Kaiser Aluminum result of no value here. However, The Court's analysis is useful:

The starting point for interpretation of a statute "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. G.T.E. Sylvania, Inc., 447 US 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). "By linking all post-judgment activity to the entry of a judgment, the courts have been provided a uniform time from which to determine post-judgment issues." Comment, Post-Judgment Interest in Federal Court, 37 Emory L.J. 495, 499 (1988). Both the original and the amended versions of §1961 refer specifically to the "date of judgment," which indicates a date certain.

494 US at 835.

This approach was taken by the Washington Court of Appeals: "The language of the act is clear. By providing that the interest rate as amended will apply to a judgment 'from the date of entry thereof,' the legislature manifested an intent that the new interest rate apply

only to judgments entered after the act's effective date.” Puget Sound Nat'l Bank v. St. Paul, Etc., 645 P.2d 1122, 1131 (Wash. App. 1982). Thus, by omitting specific reference to a date certain, the Utah legislature intended that judgments bear the statutory rate in effect at the time, to change each year.

Arizona's judgment interest statute, ARS §44-1201(A) (1979) also contained no reference to a “date of entry.” The Arizona Supreme Court held: “[T]hat when the statute was changed, the legal rate of interest also changed, and the interest rate stated in the judgment statute is, absent specific agreement to the contrary, subject to later modification by statute.” McBride v. Superior Court, 635 P.2d 178, 179 (Ariz. 1981).

Here, the trial court failed to follow standard statutory interpretation. Statutory interest calculated on the non-contract awards in the 1997 judgment here should have taken into account the 1993 modification by calculating simple interest on the principal amounts awarded by the jury at 12% from the December 21, 1989 judgment through May 2, 1993, then at an interest rate of 5.72% from May 3, 1993 to December 31, 1993, then 5.61% for 1994, then 9.22% for 1995, then 7.35% from January 1, 1996 to December 31, 1996, then 7.45% from January 1, 1997 to the date of judgment, from when the offset in Brown's favor would accrue contract interest (see Point VI below).

POINT V

THE TRIAL COURT ERRED BY AWARDING PRE-JUDGMENT INTEREST ON THE BREACH OF WARRANTY DAMAGES.

In this case, the trial court awarded Richards breach of warranty damages of \$100,000 and determined Richards was entitled to contract interest at a rate of 10% from April 24,

1984 through February 1, 1997. (R. 5873) The pre-judgment interest on breach of warranty damages amounted to an award of \$56,630.14. As noted in Point III, pre-judgment interest will be supported only if damages can be ascertained with mathematical precision. James Constructors, 888 P.2d at 671. Richards is not entitled to pre-judgment interest on the breach of warranty damages for two reasons. First, the breach of warranty damages were not ascertainable with mathematical precision. Second, the original judgment did not provide for such interest. That lack of interest in the original judgment was not appealed by Richards.

Pre-judgment interest is properly awarded only when "the loss had been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages." Bellon v. Malnar, 808 P.2d 1089, 1097 (Utah 1991). This Court has stated that the lack of mathematical certainty prevents an award of pre-judgment interest. Shoreline Development, Inc. v. Utah County, 835 P.2d 207, 211 (Utah App. 1992); Price-Orem v. Rawlins, Brown and Gunnell, 784 P.2d 465, 483 (Utah App. 1989). In Price-Orem, a developer had been damaged as a result of an architect's negligence in drawing defective plans for a shopping center that omitted some property. To prove damages on this issue, the developer was required to introduce expert testimony to determine the fair market value of the lost area. The court of appeals held that pre-judgment interest was not appropriate because the damages could not be calculated with mathematical certainty, stating:

For damages to be calculable with mathematical certainty, they must be ascertained "in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed"

784 P.2d at 483 (citation omitted). The court concluded that while the evidence in that case was sufficient to support the damage award, "It is far too uncertain to support a pre-judgment interest award" because the formula used by the jury to calculate lost profits was far too speculative. 784 P.2d at 483.

In this case, the jury was simply left to determine the damages incurred for the breach of warranty. The jury had the opportunity to utilize all, or none, of the testimony from various experts and all, or none, of the information contained in the exhibits or presented by witnesses to determine breach of warranty damages. The \$100,000 awarded by the jury for breach of warranty does not relate to any particular exhibit or formula as testified to by any specific witnesses. Even if the jury had specifically relied on a particular exhibit or particular testimony, under Price-Orem pre-judgment interest still would not be appropriate here because the jury, in assessing the damage, was guided by its own best judgment.

However, regardless of any mathematical precision problems, Richards still cannot claim pre-judgment interest on breach of warranty damages because he was not awarded any pre-judgment interest in the 1990 court judgment. That judgment awarded damages for breach of warranty "for the amount of \$100,000 plus interest from the initial date of the verdict on April 22, 1989" (R. 4094) No pre-judgment interest was awarded and Richards did not appeal the issue. Therefore, Richards is now foreclosed from seeking pre-judgment interest because he did not challenge the trial court's original determination that pre-judgment interest was inappropriate. Richards' failure to raise this issue in his original appeal to this Court prevents him from seeking pre-judgment interest from the trial court on

remand. The trial court committed reversible error by making this award.

POINT VI

THE TRIAL COURT SHOULD HAVE OFFSET THE JUDGMENTS SO THAT ONLY ONE NET JUDGMENT RESULTED.

The final judgment rendered in this case contains a variety of judgments for each side. (R. 5867-75; Addendum D) These judgments contain a variety of interest rates and starting dates. Despite Brown's request that the trial court consolidate all of these judgments into one net judgment in Brown's favor with one interest rate (the contract rate applicable to Brown's judgment), the trial court did not do so. (R. 5554)

This Court has recently indicated that when claims and counterclaims in an action are related to the same or related subject matter, a trial court should enter only one net judgment. Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180, (Utah Ct. App. 1997). In Bailey II, the defendants complained because that portion of the judgment in their favor was applied as an offset to an original judgment in favor of the plaintiff. 945 P.2d at 192. This Court first stated that while some jurisdictions maintain an artificial distinction which prevents offsets, in Utah "the distinctions between counterclaims and setoffs have been dissolved." 945 P.2d at 192, citing Mark VII Fin. Consultants Corp. v. Smedley, 792 P.2d 130, 133 (Utah App. 1990). The court then stated:

Hence, we agree with the reasoning of the Ohio Court of Appeals that "[i]n a situation such as this where adverse claims are made relating to the same or related subject matter, the trial court may make findings in favor of either party but should render only one judgment and that in favor of the party having the greater amount due." Betz v. Timmons, 119 Ohio App. 239, 199 N.E.2d 22, 23 (1963). . . .

945 P.2d at 192-93.

The reason supporting a single judgment was stated (in another context) by the U. S. Supreme Court in Citizens Bank of Maryland V. Strumpf, 116 S.Ct. 286, 289 (1995): “The right of setoff (also called “offset”) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding ‘the absurdity of making A pay B when B owes A.’” (quoting Studley v. Boylston Nat. Bank, 229 U.S. 523, 528 (1913)). To avoid such an absurdity and to prevent undue confusion and mistake, this case, with its multitude of related awards and interest rates deserves a judgment with a single sum and interest rate.

POINT VII

BROWN IS ENTITLED TO FEES AND COSTS ON THIS APPEAL.

This appeal was necessitated by the trial court's inaccurate and incomplete findings of fact with respect to Richards' fees on the first appeal. Those incomplete findings were the result of Richards' failure to properly allocate time and expenses among compensable claims and non-compensable claims as required by Utah law. But for this failure, subsequent proceedings and this appeal would have been unnecessary. Therefore, should the court of appeals either sustain the trial court's reduced fee award to Richards or determine that Richards is entitled to no fees, Brown will be the prevailing party on this appeal and, as such, is entitled to his attorney fees and costs on this appeal. Management Servs. Corp. v. Development Assocs., 617 P.2d 406, 409 (Utah 1980).

RESPONSE TO ISSUES RAISED BY RICHARDS.

POINT VIII

ASSUMING, ARGUENDO, THAT AN AWARD OF ATTORNEY FEES TO RICHARDS WAS PROPER, THE TRIAL COURT'S AWARD OF TRIAL, APPEAL AND POST-APPEAL FEES TO RICHARDS WAS APPROPRIATE AND SHOULD BE UPHELD.

Brown again emphasizes the point made in Point I — that Richards should receive no attorney fees whatsoever and that the trial court's award of any attorney fees to Richards was an abuse of discretion because Richards admittedly did not offer evidence of allocation of fees required by this Court. However, should this Court choose to address the adequacy of trial court's award to Richards, Brown asserts that the amount of attorney fees awarded to Richards for trial, appeal, and post-appeal work were appropriate.

In his opening brief, Richards makes several allegations concerning alleged deficiencies in the trial court's calculation of trial fees, appeal fees and post-appeal fees. Specifically, Richards alleges that (1) the trial court erred in failing to award him fees for his defense of Brown's contract claim, (2) the trial court erred failing to award him all of his fees incurred pursuing the breach of warranty counterclaim, (3) the trial court's award of fees was not supported by sufficiently detailed findings and conclusions, and (4) the trial court erred when it awarded him only 60% of his fees incurred on the appeal and post-appeal. Before addressing each argument, two shortcomings which afflict most or all of these issues must be discussed. Richards failed to meet the standard of review for each for each issue and, with respect to all but the first issue, Richards failed to support his arguments with citation to authority. Each of these flaws is fatal.

A. *Richards failed to show that the trial court abused its discretion in the fee award.*

Richards erroneously states that the standard of review for all but one of the attorney fees issues is correction of error. Only on one issue does Richards acknowledge the true standard with respect to these issues — abuse of discretion.⁶ Because he has not demonstrated that the trial court abused its discretion, Richards failed to meet the burden imposed on him. The Utah Supreme Court and the Utah Court of Appeals have clearly delineated the standard of review applicable to attorney fees cases. Specifically, an entitlement to fees in an action is a question of law which the appellate courts review for correctness. Robertson v. Gem Ins. Co., 828 P.2d 496, 499 (Utah App. 1992). On remand the trial court here did not find that Richards was not entitled to fees, but rather, determined what portion of requested fees was compensable. Whether a trial court's findings in support of an award of attorney fees are sufficient, is a question of law also reviewed for correctness. See State v. Pharris, 846 P.2d 454, 459 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993) (Citing State v. Ramirez, 817 P.2d 774, 782 (Utah 1991)). However, critical to the resolution of this issue is the fact that a trial court has been granted "broad discretion in determining what constitutes a reasonable fee, and [the appellate courts] will consider that determination against an abuse-of-discretion standard." Dixie State Bank, 764 P.2d at 991. A trial court is granted broad discretion in determining the appropriate amount of attorney fees "due to the trial judge's familiarity with that particular litigation and with attorney fees in general. ... The trial court has personal knowledge and first-hand experience with the litigation, the skill,

⁶ Only on his Point I(C), concerning the sufficiency of the findings entered by the trial court, does Richards correctly state his burden on appeal. However, even in that issue, he cites no case law which supports his claim and, more importantly, does not discuss case law which contradicts his claim.

the experience, and the effectiveness of the attorneys involved and attorney fees in general." Willey v. Willey, 951 P.2d 226, 230, 232 (Utah 1997). For this reason, the trial court is much better suited to determine reasonable attorney fees than an appellate court, "which can only consider evidence that is in the record." Willey, 951 P.2d at 232. Finally, because of the trial court's advantaged position, the appellate court presumes that the "discretion of the trial court was properly exercised unless the record clearly shows to the contrary." Equitable Life and Casualty Ins. Co. v. Ross, 849 P.2d 1187, 1194 (Utah App. 1993) (quoting Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984)).

The party contesting the amount of fees bears the burden of demonstrating that the court abused its discretion in the fee award. The Utah Supreme Court recently stated that a party attacking an award of attorney fees could not prevail because, among other reasons, the party did not marshal "the evidence supporting an award in this amount and then show that evidence to be legally insufficient." Valcarce v. Fitzgerald, Case Nos. 960144, 960201 slip op. at 8 (Utah Modified Opinion Filed June 26, 1998).⁷ Nowhere in his opening brief does Richards ever even attempt to marshal the evidence or demonstrate that the trial court's findings and conclusions were supported by adequate evidence and should be sustained.

Throughout his opening brief, Richards boldly asserts that the evidence which he presented on fees was "unrefuted and uncontroverted." This allegation ignores hundreds of pages of transcript concerning the sufficiency and reasonableness of evidence Richards

⁷ Brown acknowledges that while Valcarce has not been released for publication and therefore is subject to amendment, the portion cited is to the amended opinion which simply states the standard of review for such claims.

submitted. Three-plus days of hearings consuming hundreds of pages of transcript and hundreds of pages of pre- and post-hearing filings demonstrate the contested nature of Richards' evidence. Yet even if the evidence was unrefuted and uncontroverted, the trial court may choose to disregard such evidence. For example, in Beckstrom v. Beckstrom, 578 P.2d 520, 523-24 (Utah 1978), an attorney offered undisputed evidence concerning the amount of fees that should be awarded. The trial court awarded about half the amount requested. The Utah Supreme Court upheld the award, saying, "Even though that evidence is undisputed, the trial judge was not necessarily compelled to accept such self-interested testimony whole cloth and make such an award; and in the absence of patent error *or clear abuse of discretion*, this court will not disturb his findings and judgment." (Emphasis added.) See also, Salmon, 916 P.2d at 899 (Russon, J.); Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215 (Utah App. 1989) ("[A] trial court is not compelled to accept the self-serving testimony of a party requesting attorney fees even if there is no opposing testimony.") vacated on other grounds, 830 P.2d 252 (Utah 1992).

Here, Richards has failed to marshal the evidence and meet the required standard of review to show the trial court abused its discretion in the award of attorney fees.

B. *This Court should not consider those issues raised by Richards which are unsupported by any citation to legal authority.*

Richards' opening brief is remarkably devoid of any significant discussion concerning Utah attorney fee cases. Indeed, in his objections to the trial court's award of attorney fees, only one issue raised by Richards, concerning a lack of fees for his alleged successful defense of Brown's contract claim, has any significant citation to authority from any jurisdiction.

Issues IB, IC, II, and III contain no citations to authority to support their arguments. Therefore, this Court should not consider these arguments. Utah appellate courts require citation to authority to support arguments advanced by parties on appeal. In Selvage one of the parties advanced a theory concerning a basis for an award of attorneys fees. However, no authority was cited for this theory nor was there any further analysis as to why the opposing party should be liable for attorney fees. This Court stated "Mere assertions are not enough to defeat the application of the general rule that attorneys fees are proper only where authorized by statute or contract." Selvage, 910 P.2d at 1264-65. In reaching this conclusion, this Court cited Rule 24(a)(9) of the Utah Rules of Appellate Procedure which requires that "The argument shall contain . . . citations to the authorities, statutes . . . relied on." See also State v. Wareham, 772 P.2d 960, 966 (Utah 1989); State v. Reiners, 803 P.2d 1300, 1301 n.2 (Utah App. 1990).

As demonstrated in this brief, there is ample Utah authority on attorney fees. Richards totally avoids cases which "set the standard" and are most relevant, such as Cottonwood Mall and Dixie State Bank. Because Richards has failed to support many of his claims with citations to supporting authority, this Court should not address those issues.

C. *Richards' claim that the trial court erred in failing to award him fees for his "successful defense of Brown's contract claims" is disingenuous.*

Richards contends that he should have been given fees for his contract defense. However, the simple response to this is that whatever evidence presented to the trial court by Richards was insufficient to support such an award. In fact, Richards assiduously avoids the fact that he refused to allocate his fees among compensable claims, non-compensable

claims, and unsuccessful claims (R. 6049, p.87; R. 6050 p.240) and there is certainly no category in the fee application for "Fees for Successful Contract Defense."

Utah appellate courts have frequently held that a refusal of a party to allocate among compensable, non-compensable and unsuccessful claims is a sufficient basis for a trial court to refuse to award attorney fees for such claims. In Schafir v. Harrigan, 879 P.2d 1384, 1394 (Utah App. 1994), this Court stated:

In this case, the trial court denied the Harrigan's motion for attorney fees because only one of the Schafir's claims stemmed from the contract and "any fees or costs uniquely applicable to the [open contractual] warranty claim are insignificant." Although the trial court could have attempted to allocate a portion of the fees to the contractual warranty claim, it decided against such action because "[i]t would not be appropriate." We believe that the trial court is in the best position to determine how much of the attorney's time was spent on each of the four issues. In addition, we think that the trial court should determine whether an allocation of fees is appropriate under the circumstances. In this case, the trial court felt it was inappropriate and we defer to its decision because there is no clear abuse of discretion.

Similarly, in Cottonwood Mall, 830 P.2d at 269-270, the plaintiff's affidavit "did not distinguish between work done that was subject to a fee award and work that was not." The trial court therefore erred when it awarded fees. See also Utah Farm Prod. Credit Ass'n v. Cox, 627 P.2d 62, 66 (Utah 1981) (no abuse of discretion in trial court's refusal to award fees where the requesting party failed to distinguish between time "spent prosecuting its complaint and the portion spent in defending the counterclaim"); Selvage, 910 P.2d at 1266 n.15 ("it may be proper to deny a request for attorney fees if the requesting party fails to allocate in accord with the directive of Cottonwood Mall ").

Richards yet maintains that he defended the contract action on the basis that Brown

failed substantially to perform the agreements. (Richards Brief, p. 27) However, none of the four Answers filed by Richards before trial mentioned substantial performance as a defense. The phrase "substantial performance" was seized upon by Richards' counsel only during trial and is now being used by Richards to justify his fee request. The trial court appropriately declined such an award.

Richards admittedly did not make the required allocations. Therefore, responsibility for the trial court's refusal to award fees of Richards' defense work is Richards'. Richards should not prosper from the admitted failure to follow this Court's directive.

D. *The trial court's award of Richards' fees for his breach of warranty claim is appropriate given the quality of evidence and his refusal to allocate as required.*

In Point IB, Richards complains that the court erred by failing to award him all the fees which he allegedly incurred in connection with his breach of warranty counterclaim.

Richards' initial counterclaim sought tort recovery, as did each subsequent amendment. Richards' case was permeated with tort issues and evidence. Almost every witness called by Richards or cross-examined by Richards was asked a full diet of tort-related questions. Richards' meager efforts to distinguish between these unrecoverable fees and those recoverable fees incurred in connection with the breach of warranty counterclaim simply do not acknowledge the realities of this case. Indeed, as the trial court found,

The theme of Richards' case was fraud. Defendant's counsel carried that claim to the jury by clear and convincing evidence by far the greater quantity of evidence and the greater number of witnesses supported negligent misrepresentation and breach of fiduciary duty. The result of the expenditure of time, efforts and expenses are clearly mirrored in the jury's verdict.

(R. 5879). Any analysis of Richards' claim for attorney fees must examine the elements of

the breach of warranty claim and the separate and distinct elements of the fraud and misrepresentation claims. The Utah Supreme Court has held: "Unlike liability for negligence, which is based on fault, breach of warranty sounds in strict liability." Groen v. Tri-O-Inc., 667 P.2d 598, 604 (Utah 1983). Thus, the jury was instructed that to recover on the warranty claim, Richards needed merely to establish, by a preponderance of the evidence (R. 2744), that the represented price of the assets was greater than the actual price of the assets. The jury was instructed that no evidence was necessary to show Brown's knowledge, past conduct or motive.⁸ (R. 2764) The court of appeals observed that no parol evidence was admissible to establish contract terms. Under this rule Richards was successful in his argument, Brown's parol evidence of integration was excluded and Brown lost \$500,000 of the award on appeal. 840 P.2d at 148.

However, the jury was instructed that the claims of fraud and misrepresentation required Richards to meet a clear and convincing burden of proof, with a vastly expanded array of admissible evidence. (R. 2747) To establish the elements of fraud and misrepresentation, the jury was instructed that Richards was required to prove Brown's knowledge and motives. (R. 2757, 2759) As a result, Richards used otherwise inadmissible parol evidence to meet his burden for fraud and negligent misrepresentation. On remand, Richards' fee request did not include this disparity in the evidence and the burden of proof.

Because Richards could not separate his warranty-related fees from fees for his other claims, the trial court was required to examine, among other things, which of the witnesses

⁸Mr. Campbell said: "And as the court stated, the warranty doesn't turn or depend upon the motive or intention, or even good faith, of the representor." (R. 4226, p. 5081)

would not have been subject to cross-examination but for the tort allegations of fraud, negligent misrepresentation and breach of fiduciary duty. This was a rather difficult chore except for the fact that even a cursory review of at least ten of Richards' witnesses⁹ reveals Richards' unbridled pursuit of tort liability by repeatedly addressing evidence of Brown's knowledge and motive, evidence unnecessary on the contract claim. Even the parties testified extensively on non-warranty issues. Such evidence therefore was introduced for only one purpose — to prove fraud, to show Brown was deceitful, dishonest, unscrupulous and a liar. This evidence was wholly unnecessary, even inadmissible, on the breach of warranty issue.

Richards vehemently argues that the factual issues of warranty and fraud overlap and that he is entitled to recover fees under the contract for the commonality of some facts. However, in answering the special interrogatories, the jury found that benefit of the bargain damages, even though available, were not appropriate for the warranty claims. (R. 2820) This suggests the jury instinctively understood the difference between *ex delicto* (from the tort) and *ex contractu* (from the contract) claims and found that the prior fraud, not the breach of warranty, caused Richards benefit of the bargain damages. Thus, Richards may not recover contract fees for a simple contract claim which followed in the wake of a very successful fraud case, unless the fees requested are separately identified and appropriate to only the

⁹Those witnesses were: Mark Rushton, Larry Steed, and Laslo Preyse, who all testified concerning Hobbs meters and reputation; Justin Eccles, who testified concerning the misrepresentations concerning one of the airplanes and reputation; Ralph Lewis, who testified concerning deicing and reputation; John Sharp, who testified concerning air craft use records; Phillip Upchurch, who testified concerning flight recorder of one of the airplanes; Barbara Hepner, who testified concerning reputation and service; and Lee Brown, Don Wittke, and Steven Featherstone who all testified concerning fiduciary duty. (R. 4976)

simple contract issue.

Reductions made by Richards do not adequately distinguish between compensable breach of warranty claims and non-compensable fraud claims and are arbitrary and self-serving. Richards explained the arbitrary decision not to allocate the fees for "factual development and discovery scheduling" with the cryptic phrase "because it would have been necessary regardless of the specific claim . . . [and] content" (R. 5125) Unquestionably most of the work spent in "factual development and discovery scheduling" was spent developing the facts supporting fraud and scheduling discovery of fraud witnesses. Richards' arbitrary reduction percentage for "Plaintiff's discovery" is reached by counting the number of interrogatories and requests, determining which were non-compensable issues and then making an arithmetic reduction. (R. 5126-9) But, that approach did not appear in "Preparation of answer and counterclaim" (R. 5126), where the court's previous 30% real estate reduction figure was applied. Yet, a quick check of Richards' initial counterclaim sought recovery on six claims, only one (or 17%) of which was the compensable breach of warranty claim. Richards' third amended counterclaim listed four causes of action, only one (25%) of which related to the contract. By the arbitrary method used for discovery, it would have been consistent to reduce the time spent for "preparation of answer and counterclaim," "factual development and discovery scheduling," and even "general trial preparation and trial" by 75% to 83%. Richards now complains because the trial court made its own calculations.

The count-the-numbers reduction approach reappears in the "Jury Instructions and Special Interrogatories" category (R. 5134) and "general trial preparation and trial" category

(R. 5135) but in the latter no attempt was made to explain which exhibits or which witnesses supported non-compensable claims. Of the thirty witnesses, for which no reduction was made, it could fairly be said that virtually everyone of them testified at length concerning fraud-related issues. The trial court, in reaching its findings, recalled the days of testimony concerning inventory, Hobbs meters and deicing procedures, all of which concerned fraud or negligent misrepresentation. (R. 5303-4) That evidence had absolutely nothing to do with the contractual claims and all the fees incurred in developing and presenting it should have been excluded. Richards' current argument, that the trial court erred when it reduced his fees for the breach of warranty on the counterclaim, is simply disingenuous. That argument ignores the fact that it was he who refused to allocate among compensable claims, non-compensable claims, and claims for which he was unsuccessful. Had this allocation been made as required by the court of appeals on remand, the trial court's task would have been infinitely easier and its conclusion far more accurate. Because Richards failed to do so, the trial court was left to its own devices concerning the calculation of fees. Richards should not now complain that the calculation used by the trial court was an abuse of discretion.

E. *The trial court's findings in this case were sufficient to support the fee award.*

In Point IC, Richards complains that the court's detailed findings are not adequate to support the award and this case should be remanded for additional findings. Brief of Appellant at 35-38. However, if such findings were appropriate at all, these are sufficient.

Utah courts have established a rather low standard of for a trial court's findings of fact concerning an attorney fee award. For example, in Salmon, Justice Russon noted the trial

court's brief findings and stated that: "[T]his Court has never directed trial courts to record the manner in which each factor affected the trial court's ultimate conclusion. Such a requirement is unnecessary." 916 P.2d at 897. Even Chief Justice Zimmerman, who formed a majority on this point, noted the findings were "minimal," yet acknowledged that the findings were "minimally sufficient to withstand a remand." 916 P.2d at 900-01.

Here, findings of fact entered by the trial court consume eight pages. They acknowledge the shortcomings in Richards' evidence and refer to the factors listed in various opinions by this Court and the Utah Supreme Court which must be relied upon by a trial court in making its award of attorney fees. The findings and conclusions of the trial court here are far more extensive than those in Salmon which were upheld. If otherwise appropriate, the findings and conclusions are sufficient and should be upheld.

F. *The court's award of 60% of Richards' appeal and post-appeal fees is sufficient.*

Richards complains that the trial court's award of 60% of his appeal and post-appeal attorney fees was insufficient. Any insufficiency in this award was caused by Richards' failure to allocate fees among compensable, non-compensable and unsuccessful claims. In other words, Richards forced the trial court to apply its own formulas in order to calculate fees. Now Richards complains that the trial court's formula was less than he desired.

The court's minute entry of December 31, 1996, delineates the court's reasoning in arriving at the amount, including a lack of allocations required on remand. (R. 5706-13; Addendum B) The trial court concluded that,

[D]efendants' counsel allocates more time to defendants' successful claims on appeal and makes no allowance for the fact that plaintiffs prevailed on many

issues. The defendants' request of \$134,751 for fees incurred on appeal and for defending Brown's unsuccessful petition for certiorari to the Utah Supreme Court does not allocate those fees to any particular claims. The court finds that a more reasonable allocation in time and successfully pursuing the appeal would be 60% of the total fees expended by defendants' counsel or \$80,987.28 awarded to Richards for appeals fees.

(R. 5881) The 60% multiplier for appeal and post appeal fees was arrived at by the trial court after determining that the main theme of Richards' case was fraud. (R. 5553 p. 6-8; R. 5710) The allocation of fees awarded by the trial court was just and appropriate and Richards should not now complain because he refused to comply with the remand order.

POINT IX

RICHARDS IS ENTITLED TO RECOVER ONLY TRADITIONAL COSTS.

Richards claims he is entitled to all out-of-pocket expenses incurred by his attorneys, such as expert witness fees to his accounting firm, long-distance telephone costs, photocopies and temporary services. Richards was awarded only his filing fees, witness fees, and service costs. (R. 5554, p. 9-10)

The contract under which Richards recovered warranty damages provided that the prevailing party may "recover its reasonable attorney' fees and costs incurred in connection therewith." Brown, 840 P.2d at 154. The trial court ruled that the term "costs," as used in the contract, would be given "its usual and ordinary meaning." (R.5554) "Costs" as used in Rule 54 U.R.C.P., does not include the out-of-pocket expenses Richards claimed. See Frampton v. Wilson, 605 P.2d 771, 773-774 (Utah 1980) (medical and accident reconstruction expert witness fees not recoverable as costs); Hatanaka v. Struhs, 738 P.2d 1052, 1055 (Utah App. 1987) (surveyor's fees not recoverable as costs). Citing Frampton and Hatanaka, this

Court in Stevens v. Stevens, 754 P.2d 952, 959 (Utah App. 1988), disallowed appraisal expenses as costs, observing: “The term “costs” as used under [Rule 54(d)(1) includes] court and witness fees which are required to be paid and for which a statute authorizes payment. *Other expenses incurred in the preparation of litigation, even though necessary, are not chargeable as costs.*” (Emphasis added, citations omitted).

Richards does not disagree with the trial court's legal conclusion. Instead, Richards argues that because the 1990 judgment considered “all costs and expenditures made in aid of litigation” in making its inseparable award of costs and fees (R. 4100), the trial court is now precluded from awarding Richards his traditional costs and correcting any mistakes. However, it was this inseparable award of attorneys fees *and costs* to Richards that was vacated by this Court because the trial court's findings were inadequate. 840 P.2d at 156.

Because this fee and cost award was vacated, it could not have the effect of res judicata. When Richards' judgment for fees, which inseparably included costs, was vacated, the trial court's reasoning behind the judgment was similarly discarded. The trial court was then required to enter specific findings and conclusions addressing each of the separate components of Richards' request for fees and costs. The trial court specifically determined that the term “costs” must be given its traditional meaning.

Even if the trial court's correct analysis of costs could be construed as a revision of an earlier ruling, nothing prevents a trial judge from correcting an earlier error. See Gillmor v. Wright, 850 P.2d 431, 439 (Utah 1993) (Orme, J., concurring). Here, the award of fees and costs were inseparably connected by inadequate findings. When the fees award was

vacated, with the admonition to make adequate findings, the trial judge properly addressed the matter of costs and treated it correctly.

POINT X

THE TRIAL COURT PROPERLY AWARDED FEES TO BROWN FOR RESISTING RICHARDS' UNSUCCESSFUL RESCISSION CLAIM.

Richards does not dispute the reasonableness of the fees awarded to Brown for resisting Richards' rescission claims. Instead, Richards claims that the trial judge erred in awarding any such fees to Brown. Richards suggests these fees were part of the fees the trial court originally awarded to Brown in 1990.

Richards' initial counterclaim for rescission sought cancellation of *all* the agreements between the parties, along with tort claims and a claim to enforce the "Asset Sale and Purchase" agreement. (R. 103-08) Since these claims for relief were mutually exclusive, Richards was eventually forced to drop his claim to rescind all the agreements in favor of his single contract claim and multiple tort claims. (R. 1108) The 1990 final judgment awarded \$250,000 in fees to Brown only "on the issues related to the sale of the Interwest building." (R. 4100) This award in no way included all of Brown's fees for successfully resisting Richards' all-encompassing rescission claim. Brown successfully appealed the trial court's failure to award such fees and this Court agreed, "even if such efforts were not a significant portion of the overall lawsuit." 840 P.2d at 155.

The claim that these fees were included in Judge Rigtrup's uncontested award of fees to Brown is incorrect. The trial court obviously agreed with this Court's assessment that the efforts to successfully resist Richards' claim to rescind *all* the agreements were not included

in the previous award of fees to Brown. Noting that Richards' did not contest the fee amount sought by Brown, the trial court simply awarded them to Brown.

Perhaps the real reason for Richards' appeal of this straightforward issue is to divert attention from his inclusion of rescission fees in his present fee request. Richards did not seek fees for his rescission efforts in his fee application immediately after trial: "[W]ith regard to the rescission issue, we don't claim any attorney's fees, Judge, for the time we spent in connection with that issue." (R. 4228, p. 5338) However, Richards *included* fees for his failed rescission effort in his present application. (R. 5225; R. 6050, pp.189-92) Such a position is illogical. "They may not void the contract and, at the same time, claim the benefit of the provision for attorney fees." BLT Investment Company v. Snow, 586 P.2d 456 (Utah 1978) (citation omitted). This about-face is another example of Richards' failure to allocate fees as directed by this Court and is improper in light of this Court's determination that Brown was successful on the rescission claims, not Richards.

POINT XI

RICHARDS SHOULD BE AWARDED NO FEES ON APPEAL.

Richards requests an award of attorney fees for the appeal of this matter. Such a request can only be termed outrageous. A party who has been awarded attorney fees at trial is also entitled to attorney fees and costs if that party prevails on appeal. Gardner v. Madsen, 949 P.2d 785, 792 (Utah App. 1997), citing Living Scriptures v. Cudlik, 890 P.2d 7, 11 (Utah App. 1995). The court of appeals should not even consider awarding Richards fees on appeal even should he prevail on the appeal. It was Richards' own dogmatic and obstinate

refusal to allocate fees which generated all of the issues which he now raises on appeal. Awarding Richards fees on appeal would simply reward him for his failure to comply with this Court's remand order.

CONCLUSION

On the cross-appeal, Brown requests that this Court: (1) vacate the award of attorney fees to Richards, (2) vacate the award of attorney fees for calculating fees, (3) vacate the award of interest on the attorney fees, (4) reverse the trial court's judgment that interest carry the applicable rate of interest in effect at the time of the judgment, (5) vacate the award of pre-judgment interest on the breach of warranty claim, (6) reverse the trial court's decision that the judgments should not offset, with multiple interest rates, and (7) award Brown attorney fees for this appeal. Brown then requests that the case be remanded for entry of appropriate orders.

On the issues raised by Richards, Brown requests that this Court: (1) if it rules the trial court did not abuse its discretion by awarding any fees to Richards, affirm the trial court's ruling on the amount of attorney fees awarded to Richards, (2) deny Richards any fees for this appeal, (3) affirm the trial court's award of costs to Richards, and (4) affirm the trial court's award of attorney fees to Brown on the rescission claim.

DATED this 10~~th~~ day of August, 1998.

NYGAARD, COKE & VINCENT



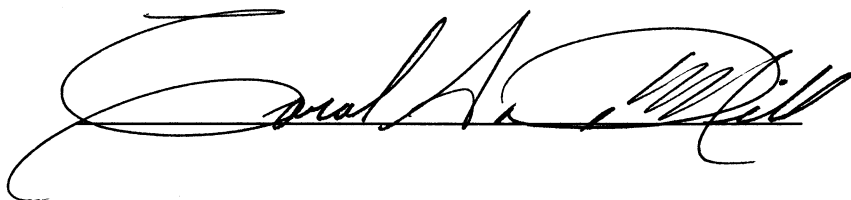
BRUCE E. COKE, Attorneys for
Plaintiffs, Appellees and Cross-Appellants

MAILING CERTIFICATE

I hereby certify that one copy of the above and foregoing BRIEF OF PLAINTIFFS, APPELLEES AND CROSS-APPELLANTS was mailed by United States Mail, postage prepaid this 12th day of August, 1998, one copy each, to the following counsel:

Robert S. Campbell, Jr.
Bridget K. Romano
CAMPBELL MAACK & SESSIONS
201 South Main Street, 13th Floor
Salt Lake City, Utah 84101

Elizabeth T. Dunning
Carolyn Cox
WATKISS DUNNING & WATKISS, P.C.
111 East Broadway, Suite 800
Salt Lake City, Utah 84111-2304

A handwritten signature in black ink, appearing to read "Carol A. Dunning", written in a cursive style.

ADDENDA TO
BRIEF OF APPELLEES/CROSS-APPELLANTS

- ADDENDUM A Ruling of Judge Rigtrup issued April 1, 1996. (R. 5552-56)
- ADDENDUM B Trial court's minute entry of December 31, 1996 (R. 5706-16)
- ADDENDUM C Findings of Fact and Conclusions of Law on Post Appeal
Matters (Post Reconsideration) filed March 21, 1997 (R. 5876-83)
- ADDENDUM D Judgement filed March 21, 1997 (R. 5867-75)
- ADDENDUM E Summary of agreements
- ADDENDUM F Watkiss & Campbell, Description of Services/Costs (R. 4660)
- ADDENDUM G Watkiss & Campbell, Description of Services/Costs (R. 4677)
- ADDENDUM H Watkiss & Campbell, Description of Services/Costs (R. 4697)

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT FOR

SALT LAKE COUNTY, STATE OF UTAH

BOYD J. BROWN, et al.,

Plaintiff,

-vs-

DAVID K. RICHARDS, et al.,

Defendant.

Case No. C87-1411

BENCH DECISION, 4-1-96

ORIGINAL

BE IT REMEMBERED that on the 1st day

of April, 1996, at 8:45 o'clock a.m., this cause came

on for hearing before the HONORABLE KENNETH RIGTRUP,

District Court, without a jury in the Salt Lake

County Courthouse, Salt Lake City, Utah.

APPEARANCES:

For the Plaintiff: BRUCE COKE
Attorney at Law

For the Defendant: ROBERT CAMPBELL
ELIZABETH DUNNING
Attorneys at Law

CAT by: CARLTON S. WAY, CSR, RPR

PROCEEDINGS

THE COURT: This is in the case of Boyd

J. Brown versus David K. Richards, et al.;

File C87-1411.

We've got pending the motion to Lift Judgment Lien and Request for Hearing. Before we address that motion, let me share my decision with you.

Messrs. Coke and Call, before you are too hasty in your criticism, I'd call upon you to reflect on the earlier award of fees which you had. And I realize they weren't appealed, but I've kept that in mind in the award of fees to Mr. Richards. And I think if it can be said that the task of the Defendants in pursuing their fraud claims was large in comparison to all the other tasks, on the other side of the coin the task in defending the fraud claims was a rather large task on the part of Mr. Brown and occupied a good deal of your time. So I did try to keep some balance in terms of what I had done in the past, though I realize that fee went unchallenged.

On remand, the Utah Court of Appeals has directed the Court to recalculate Defendant's outstanding balance and interest owing on the Interwest Purchase Agreement at time of trial.

Also this Court has been directed to redetermine the amount of attorney fees due Richards through trial.

The Court of Appeals reversed this Court for its failure to award Brown attorneys' fees for his successful efforts in enforcing his contractual rights unrelated to the sale of Interwest assets, which this Court needs to determine.

The Court of Appeals has concluded that Richards was the prevailing party on appeal.

Both parties were directed on remand to make their respective evidentiary showings of reasonable fees pertaining to the appeal as outlined in the Court's opinion.

Finally, the judgment will require correction to reinstate the jury's verdict that Richards was entitled to \$100,000 on his breach of warranty claim.

Also, the issues of tax and related costs is before this Court.

Richards, in the fee hearing before this Court, has asserted a claim for fees incurred in going forward with the fee hearing.

The Court of Appeals observed that in this case the award of attorneys' fees is a complex

matter due to the adjudication of multiple claims arising under several contracts with each party winning some and losing some. This Court heartily agrees.

In Footnote 12 on the same page the appeals court directed on remand Richards must set out the time and fees expended for successful claims which there may be an entitlement to attorney fees, unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful and claims for which there is no entitlement to attorney fees.

The trial court's findings should then mirror the foregoing categories so they may be reviewable.

The recalculation of Defendant's outstanding balance and interest due on the Interwest Purchase Agreement is based on the accountings contained in Exhibits P-6 and P-11. Making the \$500,000 adjustment and arriving at the new balance due involves the process of mathematical calculation which the Court assumes can be accomplished between the parties.

The total time expended by the attorneys for both sides was reasonably close and to some

1 extent validates the overall reasonableness of time
2 and services rendered by the attorneys in pursuing
3 the case to conclusion.

4 The hourly billing rates charged by
5 counsel for Defendant, while somewhat higher than
6 those by billed by Plaintiff's attorneys, were
7 nonetheless generally consistent with rates
8 customarily charged in the community for similar
9 services considering the complexities of the
10 litigation involved and the experience and skills of
11 Defendant's counsel.

12 Mr. Campbell testified that counsel for
13 Defendant did not allocate time based on individual
14 claims, and they do not to this day because of the
15 impracticality of doing so. It would be difficult,
16 if not impossible in many instances, to know how
17 efforts made might relate to one claim or another.
18 There was an overlapping of the warranty evidence and
19 fraud evidence such that one could not allocate the
20 time expended to one claim or to the other with any
21 degree of precision. The entries in the billing of
22 Defendant's counsel are like those of counsel for
23 Plaintiffs, quite general and vague. Over 200 hours
24 were expended by counsel for Defendants in allocating
25 time expended in this case.

1 Out of \$1,450,000 found by the jury in
2 favor of Richards, only 100,000 was found by the jury
3 as damages relating to breach of warranties. In
4 achieving that result, counsel for Defendants in
5 pursuing the claims of the counterclaim dealt with
6 the issues of fraud, negligent misrepresentation,
7 breach of warranty, breach of fiduciary duty,
8 punitive damages and damages. In addition, they
9 pursued a claim for rescission, which ultimately was
10 dropped prior to trial. Also, a part performance
11 claim was asserted by them when the case was
12 submitted to the jury.

13 In defending Plaintiff's complaint, they
14 dealt with issues relating to the sale of assets as
15 well as issues relating to the sale of the building,
16 which generally were less difficult and more straight
17 forward. They dealt with tax issues, rent issues,
18 continuance problems, the extended problems relating
19 to Defendant's damage claims, efforts in seeking
20 mandamus, problems relating to the undertaking of
21 security and other miscellaneous problems along the
22 way.

23 The theme of Richards' case was fraud.
24 They carried that claim to the Jury by clear and
25 convincing evidence. By far the greater quantity of

1 evidence and the greater number of witnesses
2 supported negligent misrepresentation and breach of
3 fiduciary duty. The result of expenditure of time,
4 efforts and expenses are fairly mirrored in the
5 Jury's verdict.

6 Considering all of the foregoing, the
7 Court concludes and finds that the allegation of
8 Defendant's counsel allocates more time to
9 Defendant's claims of breach warranty than are
10 reasonable and fair. The Court finds that a more
11 reasonable allocation of time expended in
12 successfully pursuing that claim would be generally
13 35 percent of the total time expended through trial
14 or allowable fees of \$218,986.42 to Richards.

15 The Defendants successfully defeated
16 Plaintiff's claim to an increased purchase price of
17 500,000 for the Interwest assets when Richards did
18 not exercise the option to purchase the Executive Air
19 Terminal building, which was a significant appeal
20 issue on which Defendants prevailed. In addition,
21 they successfully reinstated the \$100,000 breach of
22 warranty verdict on appeal.

23 Brown and Interwest, on the other hand,
24 successfully defended Richards' claims for rescission
25 for which Brown was entitled to an award of fees.

1 Finally, Brown and Interwest prevailed in
2 defeating the fees award by the trial court to
3 Richards through trial.

4 There were a number of other issues
5 raised on appeal which were considered but were not
6 treated by the Court of Appeals in its decision.

7 Considering the foregoing, the Court
8 concludes and finds that the allocation of
9 Defendants' counsel allocates more time to the claims
10 Defendants prevailed on on appeal, and makes no
11 allowance for the fact that Plaintiffs prevailed on
12 any issues. The Court finds that a more reasonable
13 allocation of time in successfully pursuing the
14 appeal would be 60 percent of the total time
15 expended, or an allowable fee to Richards on appeal
16 of \$80,987.28.

17 Defendants seek an award of \$134,751 for
18 fees incurred in appellate review and in a petition
19 to the Utah Supreme Court for certiorari, which was not
20 accepted. No effort was made by counsel for
21 Defendants to allocate those fees to any particular
22 claims; accordingly, those fees are disallowed.

23 Additionally, Defendants seek attorneys'
24 fees and costs post-appeal from November 1, 1993,
25 through February 1, 1995, in the amount of

1 \$78,169.32. Again, no allocation thereof has been
2 made, and those fees and costs are disallowed.
3 There appears to be no dispute in Brown's
4 claims for fees incurred in successfully resisting
5 Richard's rescission claim; accordingly, Brown is
6 awarded judgment against Richards for these fees in
7 the amount of \$7,879.50.

8 The contract language in question
9 provides for the recovery to the prevailing party of
10 its reasonable attorneys' fees and costs. The Court
11 construes "costs" in its usual and ordinary meaning.
12 There appear to be no dispute -- appears to be no
13 dispute in Defendants' appellate costs. Defendants
14 are awarded their costs incurred on appeal in the
15 amount of \$1,835.09.

16 Defendants' filing fees of \$235 are not
17 contested and are recoverable. They are allowed and
18 taxed.

19 While the witness fees of \$955 are not
20 specifically attributed to particular witnesses, when
21 divided by 35, little more than the statutory witness
22 fee plus modest mileage results; accordingly, the
23 full \$955 is allowed and taxed.

24 The Court concludes that other identified
25 expenses and costs are not properly recoverable as

1 costs; accordingly, the Defendants are awarded total
2 trial costs of \$1,190.

3 Notwithstanding any prior rulings on
4 interest, under James Constructors Inc. v. Salt Lake
5 City Corporation, prejudgment interest is not
6 appropriate. However, the issues herein were finally
7 submitted to Court by Plaintiff's summary, however
8 relief requested and filed with this court February
9 3, 1995.

10 The Court concludes that it would be --
11 it would be fair and reasonable to award interest on
12 the amounts awarded herein at the rate of ten percent
13 per annum from and after February 3, 1995.

14 The Court is uncertain as to who will owe
15 who when this is all factored into the judgment.
16 Plaintiffs' counsel are requested to incorporate
17 these rulings into the former judgment, prior
18 interest rulings of the Court and the rulings of the
19 Utah Court of Appeals and submit a final judgment
20 approved as to form by Defendants' counsel.

21 How long, Mr. Coke, do you need to do
22 that task?

23 MR. COKE: A week? Considering what I
24 have on my plate already.

25 THE COURT: I did that because when the

1 other side does the proposals you object to them.
2 I'm not so sure that you can do any better, but I am
3 going to give you a try. And I assume you'll confer
4 with them as you go along and as you trip into
5 problems and hopefully get it done and concluded.

6 MR. COKE: I can do that.

7 MS. DUNNING: May I, Your Honor?

8 When you talk about James Constructors
9 and no prejudgment interest being proper, I assume
10 that's on the attorney fees?

11 THE COURT: Yes, attorney fees and costs.

12 MS. DUNNING: Not on the \$100,000, which
13 was --

14 THE COURT: No. I think that \$100,000
15 should go clear back to the time of the Special
16 Verdict.

17 MS. DUNNING: That was your previous
18 ruling, and I wanted to make sure that we didn't
19 have --

20 THE COURT: I made a number of rulings.
21 I didn't sign an order because I got an objection.
22 We never did have a hearing. And I still have those
23 orders. The only rulings I intended to retreat on
24 were the ones that were reflected in the James
25 Construction decision that relates to fees.

1 MS. DUNNING: Your Honor, in the interim
2 while we are working on this order, which in the past
3 has been a very lengthy process, will the Court lift
4 the judgment lien on Mr. Richards' property so that
5 -- I don't think the difference, given where we are,
6 is going to be so enormous that Mr. Brown is at any
7 risk in the interim for being unsecured.

8 THE COURT: I think you are going to be
9 fairly close, is my guess, but -- and I've kind of
10 roughed it out in my mind at least, and it seems to
11 me that the end result is not going to be far apart.

12 MS. DUNNING: Right. So, in the
13 meantime, Mr. Richards has got a development project
14 on some land in Salt Lake County which was the
15 subject of the most recent request to lift the
16 judgment lien. And he --

17 THE COURT: Is another ten days going to
18 cause a problem --

19 MS. DUNNING: Well --

20 THE COURT: -- if we can get the final
21 judgment done and entered? And then we know what it
22 is.

23 MS. DUNNING: The question is, is there
24 any really likelihood that this will be done in ten
25 days. And I think the answer is not. Mr. Coke said

1 he has some other pressing things he has to do
2 first. And our history was it took eight months to
3 do the first judgment. I am just concerned that it
4 is not -- I think it's going to be weeks before we
5 are back before you. If the Court --

6 THE COURT: How much have we got in
7 Summit County?

8 MS. DUNNING: I think it is about 1,900
9 acres.

10 THE COURT: Mr. Coke, do you want to
11 respond?

12 MR. COKE: The reason I asked the Court
13 to rule is so that I could then discern what it is.
14 If it is discerned by me from your order and looking
15 at my files, the amount is, as suggested, small,
16 then, of course, I don't have any problems. On the
17 other hand, I don't know anything about the Summit
18 County property other than it is Summit County
19 property. And it may be worth a lot of money; it may
20 not be worth anything. It is not nearly as nice as
21 having interest in the proceeds from a sale which I
22 waived. And I am not trying to be an obstructionist
23 here. I am trying to be sensible because I am the
24 one that has to waive it. My client is away.

25 THE COURT: I think I ought to decide the

1 issue by the end of the week. And I ought to give
2 you a chance at least to take what you've got and
3 rough it out in your mind and review it and see if
4 you can ascertain what the difference is. I think it
5 is fairly close. And if it is, then we ought to free
6 up everything other than is essential to secure what
7 there is left.

8 MR. CAMPBELL: Your Honor, can't the
9 Court simply order us to just submit an order or a
10 judgment incorporating the Court's rulings in ten
11 days? I mean, these are -- these are now arithmetic
12 numbers --

13 THE COURT: I think they are.

14 MR. CAMPBELL: -- I think that no one can
15 dispute. They may not like it one way or the other,
16 but the judgment is subject right now to very finite,
17 precise calculation, and we ought to be able to get
18 that back to the Court in ten days. If we don't do
19 that and the Court doesn't order it, it will be weeks
20 before we do it.

21 THE COURT: Well, Mr. Coke says a week,
22 and so I assume we can have it done in a week and
23 submit it for approval and know where we are. I
24 would invite -- although I have been in trial for
25 about five weeks and we'll start another one

1 Wednesday, I'm available early in the morning or late
2 at night or the noon hour or whatever, and I would
3 invite conference calls to get off center and get it
4 done. So --

5 MR. CAMPBELL: Would the Court --

6 THE COURT: -- today is the -- I think we
7 ought to have the final judgment submitted by the
8 10th of April, and then I'll rule on the extent of
9 the security left and complete it.

10 MR. CAMPBELL: In the arriving of the
11 amount and the calculation of attorneys fees, Your
12 Honor, the Court indicated some general numbers of 35
13 percent and 60 percent, respectively, for attorney
14 fees at trial and on appeal. But did the Court make
15 a calculation or follow-up methodology in arriving at
16 the amount that is set forth of the 200 and -- for
17 example, the -- the amount of \$218,000 the Court
18 awarded for Richards in the allocation? Was that
19 based on 35 percent of the total amount that Richards
20 submitted to the Court, or is that based on an hourly
21 calculation of the number of hours that were spent
22 and the calculation of those hours?

23 THE COURT: First I surveyed and reviewed
24 the evidence that was first presented on the total
25 hours by both attorneys on both sides. I went back

1 and reviewed what I had awarded Mr. Brown for his
2 efforts. And then I went back and reviewed the time
3 expended at trial, all the claims and the general
4 tasks that were involved. And based upon that, I
5 took 35 percent of your claimed time and hours
6 through trial and awarded that amount.

7 Then on the appeal time, I went back and
8 surveyed as best I could, keeping in mind that the
9 Court of Appeals said there were a number of issues
10 that were asserted but weren't -- and were considered
11 but not treated in their decision. I did not have
12 those briefs. But, overall, I reviewed the claims
13 that they treated specifically and how that compared
14 with what was tried, and awarded 60 percent of those
15 hours in the time expended in the appellate process,
16 and then disallowed everything post-appeal.

17 MR. COKE: Thank you, Your Honor.

18 MR. CAMPBELL: Thank you, Your Honor.

(Hearing adjourned.)

REPORTER'S CERTIFICATE

1
2
3 STATE OF UTAH)
) ss.
4 County of SALT LAKE)
5
6 I, CARLTON S WAY, CSR, do hereby certify
7 that I am a Certified Shorthand Reporter and a Notary
8 Public in and for the State of Utah.
9 That I took down the proceedings aforesaid at
10 the time and place therein named and thereafter
11 reduced the same to print by means of computer-aided
12 transcription (CAT) under my direction and control;
13 I further certify that I have no interest in
14 the event of this action.
15 WITNESS MY HAND AND SEAL this the 2nd day of
16 April, 1996.
17
18
19 (Signature) CARLTON S WAY, CSR, RPR
20
21
22
23
24
25

005556

005556

ADDENDUM B

APR 31 1996
SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BOYD J. BROWN, an individual,	:	MINUTE ENTRY
and INTERWEST AVIATION	:	
CORPORATION, a Utah	:	
corporation,	:	
	:	
Plaintiffs and	:	CASE NO. 870901411
Counter Defendants	:	
	:	
vs.	:	
	:	
DAVID K. RICHARDS & COMPANY	:	
and DAVID K. RICHARDS, an	:	
individual,	:	
	:	
Defendants and	:	
Counter Plaintiffs.	:	

The Court announced its oral decision in the attorney's fees/cost issues on April 1, 1996. Thereafter, defendants filed a Motion for Further Reconsideration of the Court's April 1, 1996 Ruling Regarding Attorney's Fees. Also, defendants filed Richards' Objection and to Plaintiffs' Proposed Findings of Fact, Conclusions of Law and Judgment and Memorandum in Support of Richards' Motion for Reconsideration. Following replies thereto, the Court heard oral arguments thereon on June 17, 1996. Because some of the materials and case law was submitted too late for the Court's consideration and the Court wanted to further consider its rulings on the post-appeal fees and costs, the matter was taken under advisement.

The Court has now had an opportunity to review and consider the authorities submitted and has recanvassed considerable materials.

Any attack on fees found by this Court to be reasonable for Richards is unwarranted by a comparison with fees awarded earlier by this Court to Brown. The Brown fees were not appealed, while the Richards' fees were, thus subjecting the Richards' fees to a review consistent with the remand instructions of the Utah Court of Appeals. Although counsel may criticize the methodology directed to be utilized by this Court in arriving at reasonable fees, this Court has no similar freedom. Even though the proofs presented at remand hearing were admittedly not in conformity with the Court of Appeals' remand instructions, the Court nonetheless made a significant effort to consider the factors outlined by the Utah Court of Appeals in arriving at reasonable fees to be awarded Richards.

The fees of \$218,986.42 found to be reasonable by the Court for services rendered by counsel for Richards through trial shall remain the same as previously announced by the Court in its April 1, 1996 oral decision. Also, the \$80,987.28 found to be reasonable by the Court for services rendered by counsel for Richards on the appeal shall remain the same. In addition, the Court's rulings on

costs were based on the usual and ordinary interpretation of the word "costs" used in the contract; and the rulings on costs shall remain as previously made. The broader term "expenses" was not used in the contract.

The Court has reconsidered its rulings on post-appeal fees and costs in light of the majority opinion of the Utah Supreme Court in the case of David L. Salmon v. Davis County, et al., 916 P.2d 890 (Utah 1996). In view of the majorities' allowance of fees incurred in seeking fees, the Court revisits the post-appeal fee and cost issue.

As in all other fee claims, Richards' attorneys adduced evidence on the number of hours spent, their hourly rates, previously found by the Court to be consistent with those rates customarily charged in the community, and they generally described the tasks performed, or services rendered. The billings to the clients were submitted in support of the time and services involved. The overall time expended by counsel post-appeal has been questioned by plaintiffs' counsel.

In the announced decision of April 1, 1996, the claim for \$78,169.32 was disallowed by the Court for failure to allocate time and services. On reflection, the Court concludes it was wrong. Except for time expended on post-judgment lien and security

problems and the form and content of supplemental Findings, Conclusions and post-appeal Judgments, which include some other issues involving accounting, interest computation and possibly others, the substantial time and efforts of Richards' attorneys has been directed to the attorney's fee, costs and relevant interest issues.

The Court finds that counsel for Richards used "block billing" in this case. The testimony of George T. Naegle and David B. Thompson on time recording and billing practices, i.e., recording time and billing therefore for specific tasks was very credible. As Mr. Naegle testified, the insurance industry has required particualrized billings since the late 1980's. Moreover, their testimony is consistent with the remand instructions of the Utah Court of Appeals in this case and in the earlier pronouncements of both the Utah Supreme Court and the Court of Appeals.

Because time was not entered and accounted for by specific tasks, the internal accounting system could not mechanically allocate time. As a result, many needless hours were expended manually allocating time, which could have been much more efficiently handled as an accounting function. Moreover, many hours and much expense has been incurred in the fee debate.

The combined fee-cost request of \$78,169.32 for post-appeal time and expense is found by the Court to be excessive and unreasonable. Allowing 60% thereof is found by the Court to achieve a more reasonable allowance. Accordingly, in addition to the amounts awarded in the April 1, 1996 decision, the Court finds it reasonable to award defendants' counsel an additional \$46,901.59 in fees for post-appeal time and expenses, with interest thereon at the rate of 10% per annum from and after July 1, 1995 to date of post-appeal judgment.

With respect to the post-judgment interest issue, the Court has again reviewed the James Constructors, Inc. case, Mason v. Western Mortgage Loan Corporation, 754 P.2d 984 (Utah App. 1988), and the opinion of the Utah Court of Appeals in this case. This Court found what it had determined to be reasonable fees through trial for both Brown and Richards and entered Judgment thereon on October 18, 1990. Although Presiding Judge Bench at page 157 of the decision reported in 840 P.2d 143 indicated the award was "vacated", it is clear that the case was remanded "for a redetermination of the amount of fees." Based thereon, the rationale of the Mason case is applicable. Accordingly, defendants Richards are awarded post-judgment interest at the rate of 12% per annum on the \$218,986.42 from and after October 18, 1990 until paid

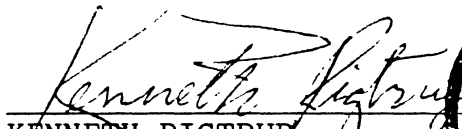
or satisfied. The Court concludes that all Judgment rates of interest are the applicable statutory interest rate at the date of entry of the Judgment, and said Judgment rate shall remain throughout the life of the Judgment. All other amounts awarded in the bench decision of April 1, 1996 and the \$46,901.59 awarded herein shall bear interest at the rate of 10% per annum from and after February 3, 1995 to date of Judgment, with the applicable Judgment rate thereon applying as of the date of the entry of the post-appeal Judgment and to continue in force and effect until paid or fully satisfied.

Plaintiffs' Motion for Supplemental Attorney's Fees and Defendants' Memorandum in Opposition to Plaintiffs' Motion for Supplemental Attorney's Fees have been reviewed in light of defendants' Objections. The post-appeal Findings and Conclusions need to be supplemented. The Court has reviewed plaintiffs' claim for supplemental fees in the amount of \$7,879.50. The Court finds that the time expended by Brown's attorneys in successfully defending against Richards' efforts to rescind contracts unrelated to the sale of Interwest assets and in successful efforts in enforcing contractual rights unrelated to the sale of Interwest assets was reasonable, that their hourly rates were appropriate and well within the rates customarily charged in the community for such

charges. The Court finds the amount of \$7,879.50 to be a reasonable charge for the services rendered, and concludes that Brown should be awarded Judgment therefore, together with 10% per annum interest from and after February 3, 1995 to date of Judgment, with the applicable Judgment rate thereon applying as of the date of the entry of the post-appeal Judgment and to continue in force and effect until paid or fully satisfied.

Attorneys for plaintiffs shall prepare new Findings of Fact and Conclusions of Law on Post-Appeal Matters and a new Post-Appeal Judgment in conformance with the April 1, 1996 bench decision, as modified hereby. The post-appeal Findings, Conclusions and Judgment shall then be submitted to counsel for defendants to sign "approved as to form." Thereafter, they shall be submitted to Judge Henriod for signature and entry.

Dated this 31st day of December, 1996.


KENNETH RIGTRUP
DISTRICT COURT JUDGE



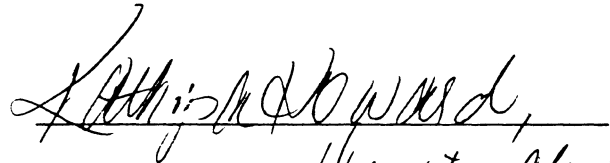
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 17 day of January, 1996:

Bruce E. Coke
John W. Call
Attorneys for Plaintiffs
333 North 300 West
Salt Lake City, Utah 84103

Robert S. Campbell, Jr., Esq.
201 S. Main, Suite 1300
Salt Lake City, Utah 84111

Elizabeth T. Dunning
Attorney for Defendants
111 E. Broadway, Suite 800
Salt Lake City, Utah 84111


Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

BOYD J. Brown, et al.,
Plaintiff,

-vs-

DAVID K. RICHARDS, et al.,
Defendant.

Case No. C87-1411
BENCH DECISION, 4-1-96

BE IT REMEMBERED that on the 1st day
of April, 1996, at 8:45 o'clock a.m., this cause came
on for hearing before the HONORABLE KENNETH RICHARDSON,
District Court, without a jury in the Salt Lake
County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the Plaintiff: BRUCE COKE
Attorney at Law

For the Defendant: ROBERT CAMPBELL
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

1 matter due to the adjudication of multiple claims
2 arising under several contracts with each party
3 winning some and losing some. This Court heartily
4 agrees. In Footnote 12 on the same page the appeals
5 court directed on remand Richards must set out the
6 time and fees expended for successful claims which
7 there may be an entitlement to attorney fees,
8 unsuccessful claims for which there would have been
9 an entitlement to attorney fees had the claims been
10 successful and claims for which there is no
11 entitlement to the attorney fees.

12 The trial court's findings should then
13 mirror the foregoing categories so they may be
14 reviewable.

15 The recalculation of Defendant's
16 outstanding balance and interest due on the Interwest
17 Purchase Agreement is based on the accountings
18 contained in Exhibits P-6 and P-11, making the
19 \$500,000 adjustment and arriving at the new balance
20 due involves the process of mathematical calculation
21 which the Court assumes can be accomplished between
22 the parties.

23 The total time expended by the attorneys
24 for both sides was reasonably close and to some
25 extent validates the overall reasonableness of time

Page 2

P R O C E E D I N G S

THE COURT: This is in the case of Boyd
J. Brown versus David K. Richards, et al.;
File C87-1411.

We've got pending the motion to Lift
Judgment Lien and Request for Hearing. Before we
address that motion, let me share my decision with
you.

Messrs. Coke and Call, before you are too
hasty in your criticism, I'd Call upon you to reflect
on the earlier award of fees which you had. And I
realize they weren't appealed, but I've kept that in
mind in the award of fees to Mr. Richards. And I
think if it can be said that the task of the
Defendants in pursuing their fraud claims was large in
comparison to all the other tasks, on the other side
of the coin the task in defending the fraud claims
was a rather large task on the part of Mr. Brown and
occupied a good deal of your time. So I did try to
keep some balance in terms of what I had done in the
past, though I realize that fee went unchallenged.

On remand, the Utah Court of Appeals has
directed the Court to recalculate Defendant's
outstanding balance and interest owing on the
Interwest Purchase Agreement at time of trial.

1 and services rendered by the attorneys in pursuing
2 the case to conclusion.

3 The hourly billing rates charged by
4 counsel for Defendant, while somewhat higher than
5 those by billed by Plaintiff's attorneys, were
6 nonetheless generally consistent with rates
7 customarily charged in the community for similar
8 services considering the complexities of the
9 litigation involved and the experience and skills of
10 Defendant's counsel.

11 Mr. Campbell testified that counsel for
12 Defendant did not allocate time based on individual
13 claims, and they do not to this day because of the
14 impracticality of doing so. It would be difficult,
15 if not impossible in many instances, to know how
16 efforts made might relate to one claim or another.
17 There was an overlapping of the warranty evidence and
18 fraud evidence such that one could not allocate the
19 time expended to one claim or to the other with any
20 degree of precision. The entries in the billing of
21 Defendant's counsel are like those of counsel for
22 Plaintiffs, quite general and vague. Over 200 hours
23 were expended by counsel for Defendants in allocating
24 time expended in this case.

25 Out of \$1,450,000 found by the jury in

Page 5

Page 3

Also this Court has been directed to
redetermine the amount of attorney fees due Richards
through trial.

The Court of Appeals reversed this Court
for its failure to award Brown attorneys' fees for
his successful efforts in enforcing his contractual
rights unrelated to the sale of Interwest assets,
which this Court needs to determine.

The Court of Appeals has concluded that
Richards was the prevailing party on appeal.

Both parties were directed on remand to
make their respective evidentiary showings of
reasonable fees pertaining to the appeal as outlined
in the Court's opinion.

Finally, the judgment will require
correction to reinstate the jury's verdict that
Richards was entitled to \$100,000 on his breach of
warranty claim.

Also, the issues of tax and related costs
is before this Court.

Richards, in the fee hearing before this
Court, has asserted a claim for fees incurred in
going forward with the fee hearing.

The Court of Appeals observed that in
this case the award of attorneys' fees is a complex

1 favor of Richards, only 100,000 was found by the jury
2 as damages relating to breach of warranties. In
3 achieving that result, counsel for Defendants in
4 pursuing the claims of the counterclaim dealt with
5 the issues of fraud, negligent misrepresentation
6 breach of warranty, breach of fiduciary duty,
7 punitive damages and damages. In addition, they
8 pursued a claim for rescission, which ultimately was
9 dropped prior to trial. Also, a part performance
10 claim was asserted by them when the case was
11 submitted to the jury.

12 In defending Plaintiff's complaint, they
13 dealt with issues relating to the sale of assets as
14 well as issues relating to the sale of the building,
15 which generally were less difficult and more straight
16 forward. They dealt with tax issues, rent issues,
17 continuance problems, the extended problems relating
18 to Defendant's damage claims, efforts in seeking
19 mandamus, problems relating to the undertaking of
20 security and other miscellaneous problems along the
21 way.

22 The theme of Richards' case was fraud.
23 They carried that claim to the Jury by clear and
24 convincing evidence. By far the greater quantity of
25 evidence and the greater number of witnesses

Page 6

1 supported negligent misrepresentation and breach of
2 fiduciary duty. The result of expenditure of time
3 efforts and expenses are fairly mirrored in the
4 Jury's verdict.

5 Considering all of the foregoing, the
6 Court concludes and finds that the allegation of
7 Defendant's counsel allocates more time to
8 Defendant's claims of breach warranty than are
9 reasonable and fair. The Court finds that a more
10 reasonable allocation of time expended in
11 successfully pursuing that claim would be generally
12 35 percent of the total time expended through trial
13 or allowable fees of \$218,986.42 to Richards.

14 The Defendants successfully defeated
15 Plaintiff's claim to an increased purchase price of
16 500,000 for the Interwest assets when Richards did
17 not exercise the option to purchase the Executive Air
18 Terminal building, which was a significant appeal
19 issue on which Defendants prevailed. In addition,
20 they successfully reinstated the \$100,000 breach of
21 warranty verdict on appeal.

22 Brown and Interwest, on the other hand,
23 successfully defended Richards' claims for rescission
24 for which Brown was entitled to an award of fees.

25 Finally, Brown and Interwest prevailed in

1 defeating the fees award by the trial court to
2 Richards through trial.

3 There were a number of other issues
4 raised on appeal which were considered but were not
5 treated by the Court of Appeals in its decision.

6 Considering the foregoing, the Court
7 concludes and finds that the allocation of
8 Defendants' counsel allocates more time to the claims
9 Defendants prevailed on on appeal, and makes no
10 allowance for the fact that Plaintiffs prevailed on
11 any issues. The Court finds that a more reasonable
12 allocation of time in successfully pursuing the
13 appeal would be 60 percent of the total time
14 expended, or an allowable fee to Richards on appeal
15 of \$80,987.28.

16 Defendants seek an award of \$134,751 for
17 fees incurred in appellate review and in a petition
18 to Utah Supreme Court for certiorari, which was not
19 accepted. No effort was made by counsel for
20 Defendants to allocate those fees to any particular
21 claims; accordingly, those fees are disallowed.

22 Additionally, Defendants seek attorneys'
23 fees and costs post-appeal from November 1, 1993,
24 through February 1, 1995, in the amount of
25 \$78,169.32. Again, no allocation thereof has been

1 made, and those fees and costs are disallowed.

2 There appears to be no dispute in Brown's
3 claims for fees incurred in successfully resisting
4 Richard's rescission claim; accordingly, Brown is
5 awarded judgment against Richards for these fees in
6 the amount of \$7,879.50.

7 The contract language in question
8 provides for the recovery to the prevailing party of
9 its reasonable attorneys' fees and costs. The Court
10 construes "costs" in its usual and ordinary meaning.
11 There appear to be no dispute -- appears to be no
12 dispute in Defendants' appellate costs. Defendants
13 are awarded their costs incurred on appeal in the
14 amount of \$1,835.09.

15 Defendants' filing fees of \$235 are not
16 contested and are recoverable. They are allowed and
17 taxed.

18 While the witness fees of \$955 are not
19 specifically attributed to particular witnesses, when
20 divided by 35, little more than the statutory witness
21 fee plus modest mileage results; accordingly, the
22 full \$955 is allowed and taxed.

23 The Court concludes that other identified
24 expenses and costs are not properly recoverable as
25 costs; accordingly, the Defendants are awarded total

1 trial costs of \$1,190.

2 Notwithstanding any prior rulings on
3 interest, under James Constructors Inc. v. Salt Lake
4 City Corporation, prejudgment interest is not
5 appropriate. However, the issues herein were finally
6 submitted to Court by Plaintiffs summary, however
7 relief requested and filed with this court February
8 3, 1995.

9 The Court concludes that it would be --
10 it would be fair and reasonable to award interest on
11 the amounts awarded herein at the rate of ten percent
12 per annum from and after February 3, 1995.

13 The Court is uncertain as to who will owe
14 who when this is all factored into the judgment.
15 Plaintiffs' counsel are requested to incorporate
16 these rulings into the former judgment, prior
17 interest rulings on the court and the rulings of the
18 Utah Court of Appeals and submit a final judgment
19 approved as to form by Defendants' counsel.

20 How long, Mr. Coke, do you need to do
21 that task?

22 MR. COKE: A week? Considering what I
23 have on my plate already.

24 THE COURT: I did that because when the
25 other side does the proposals you object to them.

1 I'm not so sure that you can do any better, but I am
2 going to give you a try. And I assume you'll confer
3 with them as you go along and as you trip into
4 problems and hopefully get it done and concluded.

5 MR. COKE: I can do that.

6 MS. DUNNING: May I, Your Honor?

7 When you talk with James Constructors and
8 no prejudgment interest being proper, I assume that's
9 on the attorney fees?

10 THE COURT: Yes, attorney fees and costs.

11 MS. DUNNING: Not on the \$100,000, which
12 was --

13 THE COURT: No. I think that \$100,000
14 should go clear back to the time of the Special
15 Verdict.

16 MS. DUNNING: That was your previous
17 ruling, and I want wanted to make sure that we didn't
18 have --

19 THE COURT: I made a number of rulings.
20 I didn't sign an order because I got an objection.
21 We never did have a hearing. And I still have those
22 orders. The only rulings I intended to retreat on
23 were the ones that were reflected in the James
24 Construction decision that relates to fees.

25 MS. DUNNING: Your Honor, in the interim

1 while we are working on this order, which in the past
2 has been a very lengthy process, will the Court lift
3 the judgment lien on Mr. Richards' property so that
4 -- I don't think the difference, given where we are,
5 is going to be so enormous that Mr. Brown is at any
6 risk in the interim for being unsecured.

7 THE COURT: I think you are going to be
8 fairly close, is my guess, but -- and I've kind of
9 roughed it out in my mind at least, and it seems to
10 me that the end result is not going to be far apart.

11 MS. DUNNING: Right. So, in the
12 meantime, Mr. Richards has got a development project
13 on some land in Salt Lake County which was the
14 subject of the most recent request to lift the
15 judgment lien. And he --

16 THE COURT: Is another ten days going to
17 cause a problem --

18 MS. DUNNING: Well --

19 THE COURT: -- if we can get the final
20 judgment done and entered? And then we know what it
21 is.

22 MS. DUNNING: The question is, is there
23 any really likelihood that this will be done in ten
24 days. And I think the answer is not. Mr. Coke said
25 he has some other pressing things he has to do

1 first. And our history was it took eight months to
2 do the first judgment. I am just concerned that it
3 is not -- I think it's going to be weeks before we
4 are back before you. If the Court --
5 THE COURT: How much have we got in
6 Summit County?
7 MS. DUNNING: I think it is about 1,900
8 acres.
9 THE COURT: Mr. Coke, do you want to
10 respond?
11 MR. COKE: The reason I asked the Court
12 to rule is so that I could then discern what it is.
13 If it is discerned by me from your order and looking
14 at my files, the amount is, as suggested, small.
15 Then, of course, I don't have any problems. On the
16 other hand, I don't know anything about the Summit
17 County property other than it Summit County
18 property. And it may be worth a lot of a money. It
19 may not be worth anything. It is not nearly as nice
20 as having interest in the proceeds from a sale which
21 I waived. And I not trying to be an obstructionist
22 here. I am trying to be sensible. Because I am the
23 one that that has to waive it. My client is away.
24 THE COURT: I think I ought to decide the
25 issue by the end of the week. And I ought to give

1 expended at trial, all the claims and the general
2 tasks that were involved. And based upon that, I
3 took 35 percent of your claimed time and hours
4 through trial and awarded that amount.
5 Then on the appeal time, I went back and
6 surveyed as best I could, keeping in mind that the
7 Court of Appeals said there were a number of issues
8 that were asserted but weren't -- and were considered
9 but not treated in their decision. I did not have
10 those briefs. But, overall, I reviewed the claims
11 that they treated specifically and how that compared
12 with what was tried, and awarded 60 percent of those
13 hours in the time expended in the appellate process,
14 and then disallowed everything post-appeal.
15 MR. COKE: Thank you, Your Honor.
16 MR. CAMPBELL: Thank you, Your Honor.
17 (Hearing adjourned.)
18
19
20
21
22
23
24
25

CERT

1 you a chance at least to take what you've got and
2 rough it out in your mind and review it and see if
3 you can ascertain what the difference is. I think it
4 is fairly close. And if it is, then we ought to free
5 up everything other than is essential to secure what
6 there is left.
7 MR. CAMPBELL: Your Honor, can't the
8 Court simply order us to just submit an order or a
9 judgment incorporating the Court's rulings in ten
10 days? I mean, these are -- these are now arithmetic
11 numbers --
12 THE COURT: I think they are.
13 MR. CAMPBELL: -- I think that no one can
14 dispute. They may not like it one way or the other,
15 but the judgment is subject right now to very finite,
16 precise calculation, and we ought to be able to get
17 that back to the Court in ten days. If we don't do
18 that and the Court doesn't order it, will be weeks
19 before we do it.
20 THE COURT: Well, Mr. Coke says a week,
21 and so I assume we can have it done in a week and
22 submit it for approval and know where we are. I
23 would invite, although I have been in trial for about
24 five weeks and we'll start another one Wednesday, I'm
25 available early in the morning or late at night or

1 the noon hour or whatever, I would invite conference
2 calls to get off center and get it done. So --
3 MR. CAMPBELL: Would the Court --
4 THE COURT: -- today is the -- I think we
5 ought to have the final judgment submitted by the
6 10th of April, and then I'll rule on the extent of
7 the security left and complete it.
8 MR. CAMPBELL: In the arriving of the
9 amount and the calculation of attorneys fees, Your
10 Honor, the Court indicated some general numbers of 35
11 percent and 60 percent, respectively, for attorney
12 fees at trial and on appeal, but did the Court make a
13 calculation or follow-up methodology in arriving at
14 the amount that is set forth of the 200 and -- for
15 example, the -- the amount of \$218,000 the Court
16 awarded for Richards in the allocation, was that
17 based on 35 percent of the total amount that Richards
18 submitted to the Court, or is that based on an hourly
19 calculation of the number of hours that were spent
20 and the calculation of those hours?
21 THE COURT: First I surveyed and reviewed
22 the evidence that was first presented on the total
23 hours by both attorneys on both sides. I went back
24 and reviewed what I had awarded Mr. Brown for his
25 efforts. And then I went back and reviewed the time

005716

ADDENDUM C

compound interest was improper; that Richards was entitled to pre-judgment interest on the breach of warranty damages from April 24, 1984, at the contract rate of 10%; and that Richards was entitled to pre-judgment interest on the yet-to-be-determined attorneys fees. The court reserved a decision on the issue of Richards' post-appeal fees.

The court permitted the plaintiff to elicit testimony from defendants' attorneys via sworn courtroom testimony of Elizabeth T. Dunning on April 12, 1994, which testimony continued via deposition on April 20, 1994. The court also granted Brown's motion to hold a full evidentiary hearing on attorney fees, which hearing was from January 31, 1995 through February 3, 1995. During that hearing Brown and Richards both called witnesses in support of their respective positions on attorneys fees. The transcripts of Ms. Dunning's testimony were also submitted. The Court announced its decision on April 1, 1996.

On June 17, 1996 the Court heard argument on Richard's motion to reconsider and took the matter under advisement. The court has also heard argument of the issue of interest and has entered its Findings of Fact and Conclusions of Law on the attorneys fees and interest issues. After considering the evidence and arguments of counsel, the court now makes and enters its:

FINDINGS OF FACT

1. The total time expended by the attorneys for both parties was reasonably close and to some extent validates the overall reasonableness of time and services rendered by the attorneys in pursuing the case to conclusion. However, the Brown fees were not appealed, while the Richards' fees were, thus subjecting the Richards' fees to review consistent with the remand instructions of the Utah Court of Appeals. Even though the proofs presented at the remand

hearing were admittedly not in conformity with the remand instructions, the Court nonetheless made a significant effort to consider the factors outlined by the court of appeals in arriving at reasonable fees to be awarded to Richards.

2. The hourly billing rates charged by counsel for defendants, while somewhat higher than those billed by plaintiffs' attorneys, were nonetheless generally consistent with rates customarily charged in the community for similar services considering the complexities of the litigation involved and the experience and skills of defendants' counsel.

3. Defendants' counsel did not allocate time based on individual claims because of the impracticality of doing so. It would be difficult if not impossible in many instances to know how efforts made might relate to one claim or another. There was an overlapping of the warranty evidence and fraud evidence such that one could not allocate the time expended to one claim or the other with any degree of precision. The entries in the billing of defendants' counsel are like those of counsel for plaintiffs, quite general and vague.

4. Over 200 hours were expended by counsel for defendants following the appeal in attempting to allocate time expended in this case.

5. Of the \$1,450,000.00 found by the jury in favor of Richards, \$100,000 was found by the jury as damages resulting to breach of warranties. In achieving that result, counsel for defendants, in pursuing the claims of the counterclaim, dealt with the issues of fraud, negligent misrepresentation, breach of warranty, breach of fiduciary duty, punitive damages and damages. In addition, defendants pursued a claim for rescission which ultimately was dropped prior to

trial. Also, a part performance claim was asserted by them when the case was submitted to the jury.

6. In defending plaintiffs' complaint, defendants' counsel dealt with issues relating to the sale of assets as well as issues relating to the sale of the building which were generally less difficult and more straight forward. Defendants' counsel dealt with tax issues, rent issues, continuance problems and the extended problems relating to defendants' damage claims, efforts in seeking mandamus, problems relating to the undertaking of security and other miscellaneous problems along the way.

7. The theme of Richards' case was fraud. Defendants' counsel carried that claim to the jury by clear and convincing evidence by far the greater quantity of evidence and the greater number of witnesses supported negligent misrepresentation and breach of fiduciary duty. The result of expenditure of time, efforts and expenses are clearly mirrored in the jury's verdict.

8. On appeal the defendants successfully defeated plaintiffs' claims to an increased purchase price of \$500,000 for the Interwest assets when Richards did not exercise the option to purchase the executive air terminal building, which was a significant appeal issue. In addition, defendants successfully reinstated the \$100,000 breach of warranty verdict on appeal.

9. Brown and Interwest on the other hand successfully defended Richards' claim for rescission for which Brown was entitled to an award of fees.

10. Brown and Interwest prevailed in gaining a remand on the issue of the fees awarded by the trial court to Richards through trial.

11. There were a number of other issues raised on appeal which were considered but were not treated by the court of appeals in its decision.

12. The Court has reconsidered Richards' claim for post-appeal fees in light of the Utah Supreme Court's opinion allowing fees incurred in seeking fees in *Salmon v. Davis Co.*, 916 P.2d 890 (Utah 1996).

13. The substantial time and efforts of Richards' attorneys post-appeal, except for time expended on post-judgment lien and security issues, on the form and content of supplemental Findings, Conclusions and Post-Appeal Judgments (which include other issues involving accounting, interest computations, etc.), have been directed to attorney fees, costs and relevant interest issues.

14. Counsel for Richards' ^{ETD}~~counsel~~ used "block-billing" in this case. The testimony of George T. Naegle and David B. Thompson on time recording and billing practices, i.e. recording time and billing therefore for the specific tasks was very credible. As Mr. Naegle testified, the insurance industry has required particularized billings since the late 1980's. Moreover, their testimony is consistent with the remand instructions of the Utah Court of Appeals in this case and the earlier pronouncements of the Utah Supreme Court and the Utah Court of Appeals.

15. Because time was not entered and accounted for by specific tasks, the internal accounting system could not mechanically allocate time. As a result, many needless post-appeal hours were spent allocating time, which could have been much more efficiently handled as an accounting function.

16. Moreover, many hours and expense have been incurred in the fee debate.

Having made and entered the foregoing Findings of Fact and having considered its previous rulings, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The court concludes that the allocation of fees by defendants' counsel allocates more time to defendants' claims of breach of warranty than is reasonable and fair. The court concludes that a more reasonable allocation of time expended in successfully pursuing that claim would be generally 35% of the total time expended through trial. Based upon the total fees generated through trial, this results in a presently allowable fee to Richards of \$218,986.42.

2. The court concludes that the allocation of fees by defendants' counsel allocates more time to defendants' successful claims on appeal and makes no allowance for the fact that plaintiffs prevailed on many issues. The defendants' request of \$134,751.00 for fees incurred on appeal and for ^{defending Brown's} ~~an~~ unsuccessful petition for certiorari to the Utah Supreme Court does not allocate those fees to any particular claims. The court finds that a more reasonable allocation of time in successfully pursuing the appeal would be 60% of the total fees expended by defendants' counsel, or \$80,987.28 awarded to Richards for appeals fees. ETD

3. Defendants seek attorneys fees and costs incurred on post-appeal matters from November 1, 1993 through February 1, 1995 in the amount of \$78,169.32. This amount is excessive and unreasonable. The Court finds that 60% of that amount, or \$46,901.59, is reasonable, with interest of 10% per annum from and after July 1, 1995 to the date of the post-appeal Judgment.

4. As found by the court of appeals, plaintiffs' counsel is entitled to fees incurred in successfully resisting defendants' rescission claim. The Court finds the hourly rates charged by Brown's counsel were appropriate and well within the rates customarily charged in the community for such services, and therefore plaintiffs are entitled to fees against defendants in the principal amount of \$7,879.50, with 10% interest per annum thereon from February 3, 1995 until the date of the post-appeal judgment. Thereafter judgment interest shall accrue at the rate of 7.45% per annum on the principal amount.

5. The language of the contract in question provides for recovery to the prevailing party of its reasonable attorneys fees and costs. The broader term "expenses" was not used in the contract. The court construes costs in its usual and ordinary meaning.

6. There appears to be no dispute in defendants' appellate costs and defendants are therefore entitled to recover appeal costs of \$1,835.09.

7. Defendants are entitled to recoverable trial costs of \$235.00 for filing fees and \$955.00 for witness fees, for a total of \$1,190.00.

8. The court concludes that other identifiable expenses incurred by defendants are not properly recoverable as costs.


9. The Court, under *James Constructors, Inc. v. Salt Lake City Corporation*, 888 P.2d 665 (Utah App. 1994) (decided after this court's August 29, 1994 ruling), concludes that pre-judgment interest on attorney fees is appropriate. Although the Utah Court of Appeals' opinion in this case indicated Richards' fee award was "vacated," it is clear that the case was remanded "for a redetermination of the amount of fees." 840 P.2d at 157. Accordingly, the

rationale of *Mason v. Western Mortgage*, 754 P.2d 984 (Utah App. 1988) is applicable. Therefore, the court concludes that it would be fair and reasonable to award pre-judgment interest on the attorney fees awarded by this court at the rate of 12% per annum on the trial fees of \$218,986.42 from and after October 18, 1990.

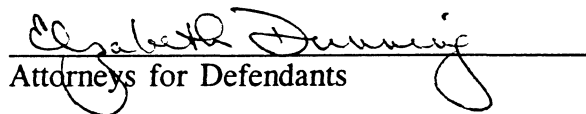
10. The Court concludes that all judgment rates of interest for new amounts awarded in the post-appeal judgment^{ETD} are fees and costs awarded pursuant to the contracts between the parties. These awards must therefore bear interest at the contract rate of 10% per annum.

DATED this 21 day of March, 1997.

BY THE COURT:


STEPHEN L. HENROID, DISTRICT JUDGE

Approved As To Form:


Attorneys for Defendants

c:\wpwin\jwcpld\brn-reco.ff

ADDENDUM D

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

MAR 21 1997

SALT LAKE COUNTY
By
Deputy Clerk

BRUCE E. COKE, ESQ., Bar No. 0694
JOHN W. CALL, ESQ., Bar No. 0542
NYGAARD, COKE & VINCENT
Attorneys for Plaintiffs and Counter Defendants
333 North 300 West
Salt Lake City, UT 84103
Telephone: (801) 328-2506

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH**

BOYD J. BROWN, an individual,)
and **INTERWEST AVIATION**)
CORPORATION, a Utah corporation)
)
 Plaintiffs and)
 Counter Defendants,)
)
vs.)
)
DAVID K. RICHARDS &)
COMPANY and **DAVID K.**)
RICHARDS, an individual,)
)
 Defendants and)
 Counter Plaintiffs.)

2163350

**POST-APPEAL JUDGMENT
(POST RECONSIDERATION)**

Civil No. C87-01411
Judge: Stephen L. Henroid

The trial by jury in the above cause began February 28, 1989 and concluded with the jury's verdict on April 22, 1989. The jury returned a special verdict which was incorporated in the Final Judgment entered by the court on October 18, 1990. Thereafter the parties appealed and an opinion was rendered in *Brown v. Richards*, 840 P.2d 143 (Utah App. 1992) by the Utah Court of Appeals.

Pursuant to the direction of the Utah Court of Appeals, the October 18, 1990 judgment is to be modified to reduce the \$900,000.00 purchase price, by the \$500,000.00 awarded to

defendants ("Richards") for fraud, to \$400,000.00 and to vacate the judgment in favor of plaintiffs ("Brown") for a \$500,000.00 increase in purchase price. The jury's verdict awarding \$100,000.00 to Richards on his breach of warranty counterclaim is to be reinstated. The other awards on Brown's claims and Richards' claims were affirmed, except the attorney fee award to Richards was vacated by the court of appeals and the matter remanded for a redetermination of the amount of fees due Brown.

This Court was directed to determine the amount of fees Brown was entitled to in enforcing his contractual rights unrelated to the asset sale. Accordingly, this Court took evidence from the parties and their attorneys, culminating in an evidentiary hearing held from January 30, 1995 through February 3, 1995. The Court announced its decision on April 1, 1996. On June 17, 1996 the Court heard argument on Richards' motion to reconsider and took the matter under advisement. The court has also heard argument of the issue of interest and has entered its Findings of Fact and Conclusions of Law on the attorneys fees and interest issues. Now, therefore, being duly advised in the premises, it is therefore:

ORDERED, ADJUDGED AND DECREED as follows:

I.

PLAINTIFFS' CLAIMS ON AMENDED COMPLAINT.

1. On plaintiffs' first cause of action, judgment is hereby entered in favor of Boyd J. Brown and against David K. Richards individually, and David K. Richards & Company in the amount of \$200,000.00 (\$450,000.00 contract price, less \$250,000.00, one-half of the \$500,000.00 reduction ordered by the Utah Court of Appeals), subject to the following interest, credits and adjustments:

Accrued Contract Interest:	\$ 23,506.20
Less Total Payments:	<u>\$ 164,925.00</u>
Principal Balance due on 4-1-86:	\$ 58,581.20

Interest has accrued from April 1, 1986 on the unpaid balance at the rate of 10% per annum, pursuant to the contract. Through February 1, 1997 the accrued interest is \$63,461.01. Brown is therefore awarded judgment in the amount of \$122,042.21, principal and interest through February 1, 1997. Interest shall continue to accrue from that date at the contract interest rate of 10% per annum on the \$58,581.20 principal balance.

2. On the plaintiffs' second cause of action, judgment is entered in favor of Boyd J. Brown and against David K. Richards individually and David K. Richards & Company in the amount of \$200,000.00 (\$450,000.00 contract price, less \$250,000.00, one-half of the \$500,000.00 reduction ordered by the Utah Court of Appeals), subject to the following interest, credits and adjustments:

Accrued Contract Interest:	\$ 22,542.00
Less Total Payments:	<u>\$ 53,693.90</u>
Balance due on 4-1-86	\$168,848.10
Interest on unpaid balance on 12/89	<u>\$ 11,301.64</u>
Principal Judgment as of 12/20/89	\$181,149.74

The principal balance due has accrued interest at the contract rate of 10% per annum in the amount of \$182,913.19, as of February 1, 1997, together with additional interest on the interest portion of the judgment balance from December 20, 1989 to February 1, 1997 of \$8,046.76. Brown is therefore awarded judgment in the amount of \$372,109.69 as of February 1, 1997. Interest shall continue to accrue at the contract interest rate of 10% per annum on the balance.

3. On plaintiffs' sixth cause of action regarding the increased purchase price, pursuant to the opinion of the Utah Court of Appeals the judgment previously awarded Brown is hereby vacated.

4. On plaintiffs' third cause of action, the jury found that David K. Richards individually and David K. Richards & Company owed, at the time of trial, the amount of \$407,259.00 on the agreement to purchase the Interwest building. There remained at that time \$490,000.00 in principal which was not yet due, but which has now become due. The court awarded Brown judgment for \$529,996.10, which included \$248,371.00 principal payments then due. The last payment made by Richards, as indicated in exhibit D-269, included a \$31,629.00 payment principal, leaving the principal due and owing, as of April 2, 1986, of \$668,371.00. All payments of principal and interest thereon have now become due and plaintiff Boyd J. Brown is therefore awarded judgment in that amount against David K. Richards individually and David K. Richards & Company. Pursuant to the contract, interest accrues at the rate of 10% per annum. Interest due thereon as of February 1, 1997 is \$724,046.30, for a total judgment of \$1,392,417.30 as of February 1, 1997. Interest shall continue to accrue at the contract interest rate of 10% per annum on the \$668,371.00 principal balance.

5. On plaintiffs' fourth cause of action, the court previously granted a motion for directed verdict and this cause of action was dismissed with prejudice in the October 18, 1990 judgment.

6. On plaintiffs' fifth cause of action, for rent on the Executive Building, the court granted judgment in favor of Boyd J. Brown and against David K. Richards individually and David K. Richards & Company in the principal amount of \$230,141.00 together with interest

then owing of \$16,645.81. Since that time additional contract interest has accrued on the principal through February 1, 1997 in the amount of \$144,643.62, for a total judgment of \$391,430.43 as of February 1, 1997. Interest shall continue to accrue on the principal balance of \$230,141.00 at the contract rate.

7. In addition to rent on the Executive Building, judgment was entered in the October 18, 1990 judgment in favor of Boyd J. Brown and against David K. Richards individually and David K. Richards & Company for the rent on the Interwest Building in the principal amount of \$6,250.00, plus interest accruing through December 20, 1989 in the amount of \$3,006.85. Since December 20, 1989 the accrued interest at the contract rate is \$4,445.01, for a total judgment of \$13,701.86 as of February 1, 1997. Interest shall continue to accrue on the principal amount from that date at the contract rate.

8. The October 18, 1990 judgment was entered in favor of Boyd J. Brown and against David K. Richards individually and David K. Richards & Company in the principal amount of \$250,000.00 for Brown's attorney fees. Since that time interest has accrued at the contract rate of 10% per annum in the amount of \$157,125.00, for a total judgment of \$407,125.00 as of February 1, 1997. Judgment interest shall continue to accrue at the contract rate of 10% per annum on the principal amount.

9. In addition to the trial fees awarded to Brown, judgment is hereby entered in favor of Boyd J. Brown and against David K. Richards individually and David K. Richards & Company for additional attorney fees, as directed by the Utah Court of Appeals, in the principal amount of \$7,879.50, together with 10% pre-judgment interest from February 5, 1995 to the date of entry herein (\$1,569.52 as of February 1, 1997), for a total judgment of \$9,449.02 as

of February 1, 1997. Judgment interest at the contract rate of 10% per annum shall accrue on the principal balance from the date of entry herein.

II

ON THE COUNTERCLAIMS OF DAVID K. RICHARDS & COMPANY AND DAVID K. RICHARDS INDIVIDUALLY.

1. As to the First Claim for Relief for fraudulent misrepresentation, this Court entered judgment against Boyd J. Brown and Interwest Aviation Corporation in the amount of \$500,000.00 together with interest from April 22, 1984 in its October 18, 1990 judgment. Pursuant to the direction of the Utah Court of Appeals this award of \$500,000.00 was applied as a reduction of the amounts owed on the first and second half of the Asset Sale Agreement. Accordingly, the judgment of this Court for \$500,000.00 on the first Claim for Relief is hereby satisfied.

2. With regard to the remaining part of defendants' First Claim for Relief as to punitive damages, the court entered judgment on October 18, 1990 in favor of David K. Richards & Company and David K. Richards individually against Boyd J. Brown in the principal amount of \$550,000.00, together with interest through December 20, 1989, in the amount of \$36,465.75. Since December 20, 1989 additional statutory judgment interest at the rate of 12% has accrued in the amount of \$470,250.00, for a total judgment of \$1,056,715.75 as of February 1, 1997. Judgment interest shall continue to accrue on the principal amount at the rate of 12% per annum.

3. As to the defendants' Second Claim for Relief for negligent misrepresentation, although the jury determined that negligent misrepresentations were made, this Court determined that the measure of compensatory damages was identical to the damages awarded defendants

under the First Claim for Relief and subsumed thereby. Therefore, judgment is entered in favor of David K. Richards & Company and David K. Richards individually against Boyd J. Brown and Interwest Aviation in the amount of \$0.00.

4. As to defendants' Third Claim for Relief of breach of warranty, the jury determined that Boyd J. Brown and Interwest Aviation Corp. breached warranties to David K. Richards & Company and David K. Richards individually in the sale of the Interwest business assets and found as damages thereof the amount of \$100,000.00 pursuant to the directive of the Utah Court of Appeals, judgment is entered in favor of David K. Richards & Company and David K. Richards individually and against Boyd J. Brown and Interwest Aviation Corp. in the amount of \$100,000.00, together with contract interest at 10% from April 24, 1984 through February 1, 1997, in the present amount of \$127,672.40 for a total judgment of \$227,672.40 as of February 1, 1997. Interest shall continue to accrue at the contract interest rate of 10% per annum on the \$100,000.00 principal balance.

5. As to defendants' Fourth Claim for Relief for breach of fiduciary duty, judgment was entered on the jury verdict in the principal amount of \$300,000.00 in favor of David K. Richards & Company and David K. Richards individually against Boyd J. Brown in the final judgment of October 18, 1990, together with interest through December 20, 1989 in the amount of \$19,890.41. Additional statutory judgment interest at 12% per annum has accrued from that day through February 1, 1997 in the amount of \$255,360.00. Total judgment therefore is \$575,250.41 as of February 1, 1997. Judgment interest shall continue to accrue on the principal amount at the rate of 12% per annum.

6. Pursuant to the Utah Court of Appeals' opinion, the prior judgment for fees awarded to Richards is vacated. Therefore, pursuant to this court's post-appeal findings of fact and conclusions of law, judgment is entered in favor of David K. Richards, individually, and David K. Richards & Company against Boyd J. Brown in the principal amounts of \$218,986.42 for trial attorney fees, \$80,987.28 for appellate fees and \$46,901.59 for post-appeal fees, for a total attorney fee award of \$346,875.29. Accrued contract judgment interest at 10% per annum is awarded on the trial fees from October 18, 1990 (\$137,632.96 as of February 1, 1997). Pre-judgment interest of 10% per annum is awarded from February 3, 1995 on the appeal fees and post-appeal fees to the date of entry herein (\$25,250.15 as of February 1, 1997), for a total judgment of \$509,758.40 as of February 1, 1997. Judgment interest shall continue to accrue at the contract rate of 10% on the trial fee principal. Judgment interest on the principal appellate and post-appeal fees shall accrue at the contract rate from the date of entry herein.

7. Based upon the court's post-appeal findings of fact and conclusions of law, defendants are awarded judgment against plaintiffs for costs in the amount of \$235.00 filing fees, \$955.00 witness fees, and \$1,835.09 appellate costs, together with pre-judgment interest of 10% per annum from February 3, 1995 to February 1, 1997 of \$605.02 for a total judgment in the amount of \$3,630.11 as of February 1, 1997. Interest will accrue on the costs from the date of entry herein at the contract rate of 10% per annum.

III

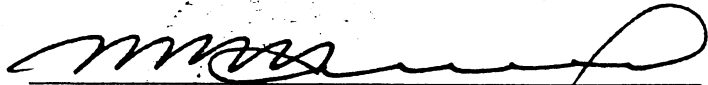
OFFSET AND STAY

1. The amounts awarded as judgment to the plaintiffs and defendants shall constitute an offset and the plaintiff Boyd J. Brown is awarded a net judgment against the defendants David K. Richards individually and David K. Richards & Company in the amount of \$335,248.38 as of February 1, 1997. Any calculation of the net judgment on the date of entry herein or any date thereafter shall be made by calculating the principal and interest due under each judgment amount awarded herein, as of the date of calculation.


2. All prior orders entered by the court staying execution of judgment are hereby vacated with the entry of this judgment.

DATED this 21 day of March, 1997.

BY THE COURT


STEPHEN L. HENROID

Approved As To Form:


Attorneys for Defendants

ADDENDUM E

ADDENDUM

SUMMARY OF DOCUMENTS EVIDENCING THE TRANSACTION BETWEEN THE TWO PARTIES

Exhibit No.	Title or Description of Document	Date Docu- ment Bears	Date Docu- ment Actually Prepared and/ or Signed
Exhibit P1	Richards' Letter Agreement	4/10/84	4/10/84
Exhibit P2	Exchange Agreement	4/13/84	4/13/84
Exhibit P4	Stock Purchase and Option Agreement	4/23/84	4/23/84
Exhibit P5	Option Agreement (First)	4/23/84	4/23/84
Exhibit P6	Asset Sale and Purchase and Option Agreement	4/23/84	7/05/84
Exhibit P7	Option Agreement (Second)	4/23/84	7/05/84
Exhibit P8	Supplemental Agreement	7/05/84	7/05/84
Exhibit P9	Richards' Letter	2/11/85	2/11/85
Exhibit P10	Agreement to Amend Pre- vious Interwest Agreements	4/09/85	4/09/85
Exhibit P11	Exercise of Option and Modification of Agreement	5/01/84	6/1985
Exhibit P12	Promissory Note	5/01/84	6/1985
Exhibit P16	Purchase Agreement	2/01/84	9/1985
Exhibit P99	Promissory Note (\$721,000)	4/30/85	Between May and June 1985

(ATTACHED AS ADDENDUM "A" TO BROWN'S BRIEF IN THE FIRST APPEAL)

ADDENDUM F

WATKISS & CAMPBELL
STATEMENT CONTINUATION

DATE	ATTY	DESCRIPTION OF SERVICES/COSTS	HOURS AMT
4/13/88	FNS	Research and prepare response to plaintiff's motion for summary judgment; telephone conference with B. Coke, Esq. regarding rescheduling hearing on motion; conference with W. Simpson and B. Weed, CPA's, regarding examination of documents relative to McMahan airplane deals; Research and prepare responses to plaintiff's motion for summary judgment.	6.6
4/14/88	FNS	Travel to Ogden for conference with J. Wightman, CPA, regarding McMahan airplane deals with B. Brown; sign and transmit stipulation to opposing counsel; telephone conference with D. K. Richards and research and prepare reply memorandum.	5.2
4/15/88	FNS	Telephone conference with D. Hunger, D.K. Richards and J. Sharp confirming deposition schedule, etc.; research and prepare response to plaintiff's motion for summary judgment.	2.2
4/15/88	R	W. Ruiz - Delivery to 3rd District Court.	.3
4/16/88	FNS	Conference with D. K. Richards regarding preparation for J. Sharp deposition; interview J. Sharp and take deposition; follow-up telephone conference with client to report deposition results.	8.1
4/18/88	RSC	Conference with Franklin N. Smith, Jr. regarding results of J. Sharp deposition and case status.	.5
4/18/88	FNS	Telephone conference with D. K. Richards and conference with Robert S. Campbell, Jr. regarding outcome of J. Sharp deposition, etc.; research and prepare reply to plaintiff's motion for summary judgment; conference with L. Kirkham, Esq. regarding further document production, etc..	6.8
4/19/88	FNS	Research and prepare response to plaintiff's motion for summary judgment; conference with D. K. Richards, G. Black and W. Martineau regarding preparations for document inspection, etc.; review documents; transmittal letter to client.	6.6
4/21/88	FNS	Research and prepare response to plaintiff's motion for partial summary judgment; telephone conference with D. Sorenson, CPA, regarding	

004660

004660

ADDENDUM G

WATKISS & CAMPBELL
STATEMENT CONTINUATION

DATE	ATTY	DESCRIPTION OF SERVICES/COSTS	HOURS/AM
8/04/88	RSC	Prepare for argument before Judge Rigtrup; hearing.	1.7 .9
8/04/88	GED	Conference with Robert S. Campbell, Jr.; review statement on judgment interest; conference with Leslie J. Randolph on research.	reduce 25% .6
8/04/88	ETD	Office conference with D. Richards; office conference with Franklin N. Smith, Jr.; review deposition summaries.	2.4
8/04/88	LJR	Campbell project.	5.4
8/04/88	AB	Proofread Richards summary; organize deposition summary books, Martineau deposition summary; copy deposition summaries for Elizabeth T. Dunning.	4.0
8/04/88	TW	Copied case and assembled binder.	1.0
8/04/88	FNS	Research and prepare for argument of motions in limine and to compel; conference with Robert S. Campbell, Jr. regarding preparation for hearing; telephone conference with client regarding results of hearing; conference with Elizabeth T. Dunning regarding transfer of case.	6.1 3.0
8/05/88	ETD	Office conference with Franklin N. Smith, Jr.; office conference with Robert S. Campbell, Jr..	reduce 25% .8
8/05/88	AB	Martineau deposition summary; proofread Richards summary; organize deposition summary books.	5.5
8/06/88	RSC	Conference with client; review case with Franklin N. Smith, Jr. and Elizabeth T. Dunning.	2.0
8/06/88	ETD	Office conference with Franklin N. Smith, Jr., Robert S. Campbell, Jr. regarding status of case.	2.0
8/08/88	AB	Martineau Vol. 1 deposition summary; proofread Richards Vol. 5 summary; Martineau Vol. 2 deposition summary.	5.5

004677

004677

ADDENDUM H

WATKISS & CAMPBELL
STATEMENT CONTINUATION

DATE	ATTY	DESCRIPTION OF SERVICES/COSTS	HOURS/ AMT.
12/02/88	CC	Review of damage research; office conference with Elizabeth T. Dunning; preparation for meeting with accountants.	2.0 reduce 50%
12/03/88	RSC	Review case with Foote; analysis of damage claims.	2.2 reduce 50%
12/03/88	ETD	Office conference with Robert S. Campbell, Jr., Foote; Carolyn Cox regarding damages.	2.5 reduce 50%
12/03/88	CC	Meeting with Elizabeth T. Dunning, Robert S. Campbell, Jr. and Foote; office conference with Elizabeth T. Dunning; review of documents list.	3.0 2.5 reduce 50%
12/04/88	RSC	Telephone conference with client; review case; meeting with Foote and T. Dunning; Review fraud allegations.	5.6 1.9 omit 1.8 reduce 50%
12/05/88	RSC	Telephone conference with client; hearing before Judge Rigtrup; meeting with Foote.	2.4 1.0 reduce 50%
12/05/88	ETD	Review Brown deposition; hearing on motion for extension of discovery; office conference with Foote; telephone conference with Smith regarding witnesses; review Sharp deposition; draft memorandum regarding witnesses; office conference with Carolyn Cox; office conference with Robert S. Campbell, Jr.; telephone conference with D. Richards.	7.3 1.0 reduce 50%
12/05/88	CC	Office conference with Elizabeth T. Dunning regarding documents; review of document list.	2.0
12/06/88	ETD	Telephone conference with D. Richards regarding witnesses; answer to interrogatories; telephone conference with Judge Rigtrup regarding motion to amend; review and revise memorandum regarding witnesses concerning Hobbs Meter; office conference with Carolyn Cox regarding documents.	1.4 .1 omit
12/06/88	CC	Visit to Interwest office; review of documents; office conference with Elizabeth T. Dunning.	3.3

004697

004697